TRANSCRIPT OF RECORD:

SUPREME COURT OF THE UNITED STATES.

No. ~~315.~~ 116

THE FIRST NATIONAL BANK OF BETHEL, PLAINTIFF IN ERROR,

VS.

THE NATIONAL PAHQUIOQUE BANK.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED NOVEMBER 29, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 315.

THE FIRST NATIONAL BANK OF BETHEL, PLAINTIFF IN ERROR,

vs.

THE NATIONAL PAHQUIOQUE BANK.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	1	3
Bond	2	5
Clerk's certificate	3	7
Summons	3	8
Plaintiff's bill of particulars	4	9
Defendant's plea and joinder	5	10
Finding by the court	7	13
Motion	12	20
Certificate of judge	14	24
Judgment of supreme court of errors	16	27
Certificate of judge	16	29
Certificate of clerk	17	30

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of errors for the State of Connecticut, county of Fairfield, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you, between The National Pahquioque Bank of Danbury, a body corporate under and by virtue of the laws of the United States, located at Danbury, State of Connecticut, plaintiffs, and The First National Bank of Bethel, a body corporate under the laws of the United States, located at Bethel, State of Connecticut, defendants, a manifest error hath happened, to the great damage of the said The First National Bank of Bethel, as by their complaint appears.

We being willing that error, if any hath been, should be duly
2 corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this suit, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 4th day of November, in the year of our Lord one thousand eight hundred and seventy.

LORIN P. WALDO,
Clerk of the Circuit Court of the United, States Second Circuit, District of Connecticut.

Allowed by—

THO'S B. BUTLER,
Chief Judge of the Supreme Court of Errors for the State of Connecticut.

3 The United States of America to The National Pahquioque Bank of Danbury, a body corporate, under & by virtue of the laws of the United States, located at Danbury, State of Connecticut, county of Fairfield, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of errors for the State of Connecticut, county of Fairfield, wherein The First National Bank of Bethel, a body corporate under the laws of the United States, located at Bethel, State of Connecticut, county of Fairfield, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas B. Butler, chief judge of the su-

preme court of errors, State of Connecticut, this 4th day of November, in the year of our Lord one thousand eight hundred and seventy.

THO'S B. BUTLER,
Chief Judge of the Supreme Court of Errors of the State of Connecticut.

4 STATE OF CONNECTICUT,
Fairfield County, ss:

On this 5th day of November, in the year of our Lord one thousand eight hundred and seventy, personally appeared Roger Averill before me, the subscriber, David B. Booth, a notary public in and for State, and makes oath that he delivered a true copy of the within citation to The National Pahquioque Bank of Danbury, by delivering the same to its cashier at its banking-house in Danbury, county of Fairfield, State of Connecticut, during banking hours, on the 5th day of November, 1870.

ROGER AVERILL.

Sworn to and subscribed the 5th day of November, 1870.
[SEAL.] DAVID B. BOOTH,
Notary Public.

5 Know all men by these presents, that we, The First National Bank of Bethel, a body corporate under the laws of the United States, located at Bethel, State of Connecticut, as principal, and Roger Averill and David B. Booth, of Danbury, in said State, as sureties, are held and firmly bound unto the National Pahquioque Bank of Danbury, a body corporate under & by virtue of the laws of the United States, located at Danbury, county of Fairfield, State of Connecticut, in the full and just sum of three hundred dollars, to be paid to the said The National Pahquioque Bank of Danbury, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 4th day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas, lately, at a term of the supreme court of errors for the State of Connecticut, county of Fairfield, in a suit depending in said court, between The National Pahquioque Bank of Danbury, a body politic under the laws of the United States, located at Danbury, State of Connecticut, plaintiffs, and The First National Bank of Bethel, a body corporate under the laws of the United States, located at Bethel, State aforesaid, defendants, judgment was rendered against the said The First National Bank of Bethel; and the said The First National Bank of Bethel having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The National Pahquioque Bank of Danbury, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said The First National Bank of Bethel shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

EDGAR S. TWEEDY, [L. S.]
Receiver First Nat'l B'k of Bethel.
ROGER AVERILL. [L. S.]
DAVID B. BOOTH. [L. S.]

Sealed and delivered in presence of—
LYMAN D. BREWSTER.

Approved by—

6 THO'S B. BUTLER,
Chief Judge of the Supreme Court of Errors of the State of Connecticut.

And is to be filed in the office of the clerk of said court, in the county of Fairfield.

7 STATE OF CONNECTICUT,
Fairfield County, ss:

And now the judges of the supreme court of errors of said State of Connecticut, make return of this writ by annexing hereto and sending herewith, under the seal of the said court, as within commanded, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, Henry T. Blake, clerk of said court, within and for said county of Fairfield, have hereunto set my hand and the seal of said court this 7th day of November, in the year of our Lord one thousand eight hundred and seventy.

Test:
[SEAL.] HENRY T. BLAKE, *Clerk.*

8 *Motion in error.*

Supreme court of errors, February (adjourned) term, 1870.

NATIONAL PAHQUIOQUE BANK
vs.
THE FIRST NAT. BANK OF BETHEL.

To the sheriff of the county of Fairfield, or his deputy, or either of the constables of the town of Bethel, within said county, greeting:

By authority of the State of Connecticut you are hereby commanded to attach, to the value of one hundred thousand dollars, the goods or estate of the First National Bank of Bethel, a body corporate, duly incorporated under and by virtue of the laws of the United States, having a banking-house at said Bethel and there located as a bank, and summon said First National Bank of Bethel to appear before the superior court, to be holden at Danbury, within and for the county of Fairfield, on the 2d Tuesday of August, 1868, then and there to answer unto the National Pahquioque Bank of Danbury, a body corporate, duly incorporated under and by virtue of the laws of the United States, having a banking-house at said Danbury, and there located as a bank, in a plea of the case whereupon the plaintiffs declare and say that the defendants, on the 15th day of May, 1868, were indebted to the plaintiffs in the sum of ninety thousand dollars, for so much money before that time had and

received of the plaintiffs by the defendants, to and for the use of the plaintiffs, and for so much money before that time paid, laid out, and expended by the plaintiffs for the defendants at the special instance and request of the defendants, and for so much money before that time lent and advanced to the defendants by the plaintiffs, at the special instance and request of the defendants, and for goods, wares, and merchandize before that time sold and delivered to the defendants by the plaintiffs, at the special instance and request of the defendants, and for work and labor done and performed by the plaintiffs for the defendants, at the special instance and request of the defendants, and for money found to be due and owing from the defendants to the plaintiffs, on an account then and there stated between them, and being so indebted the defendants afterwards, to wit, on the day and year last aforesaid,
9 in consideration thereof, undertook and faithfully promised the plaintiffs to pay them said sum of money when they should be thereto afterwards requested. Yet the plaintiffs say that the defendants, their said several promises aforesaid not regarding, have never performed the same though often requested and demanded, which is to the damage of the plaintiffs the sum of one hundred thousand dollars, and for the recovery thereof, with just costs, the plaintiffs bring this suit.

A. A. Heath is recognized in fifty dollars to prosecute, &c.

Hereof fail not, but of this writ with your doings thereon, make due return according to law.

Dated at Danbury, the 30th day of May, A. D. 1868.

WILLIAM F. TAYLOR,
Commissioner of the Superior Court.

DANBURY, *June 1st*, 1868.

FAIRFIELD COUNTY, *ss:*

Then I made service of the within writ by leaving a true and attested copy of the same with Edgar S. Tweedy, who is receiver for said First National Bank of Bethel.

Attest: ALFRED A. HEATH,
Deputy Sheriff.

FEES.—Twenty-six miles to serve and return, $2 60; one copy, 1 00; two endorsements, .25; service 12—$3 97.

Plaintiffs' bill of paticulars.

SUMMARY AS PRESENTED.

First Nat. Bank, Bethel, in acccount with Nat. Pahquioque Bank.

DR.

To bal. acc't rendered from Aug. 1, 1864, to March 1, 1865 ..... $8,900 00

CR.

By dividend from N. and I. H. Seeley est. $1,424 35 — $7,475 65

10 To am't acc't rendered from Sept. 1, 1867, to March 1, 1868 ..... 140,709 55

Credit by am't of acc't ..... 90,789 36 — $49,920 19

Interest on acc't from Nov. 1, 1867, to March 1, 1868 — 929 66

$58,325 50

INTEREST.

We hold W. A. Judd, cashier, cks. on int. First Nat. Bank of Bethel, dated Oct. 4, 1867,..... $15,000 00
" Oct. 5, 1867..... 10,000 00
" Dec. 31, 1867..... 10,000 00
which were credited to W. A. Judd, cashier, acc't, and charged to loan account. The same not being paid do not appear in the account rendered by us.

Also N. Seeley's note endorsed by I. H. Seeley and W. A. Judd, cashier, due April 17, 1868, for.....$7,000 00
On which we received dividend Oct. 20 and Dec. 12..... 1,424 35

$5,575 65
I. F. Fulton's two notes and interest..... 1,900 00

We hold the checks and notes as a part of our evidence of debt against the First Nat. Bank of Bethel. Our entire claim, however, is represented by the balance of $58,325 50 and interest.

Defendant's plea.

Fairfield County, ss. Superior court, August term, 1869.

THE NATIONAL PAHQUIOQUE BANK
vs.
FIRST NATIONAL BANK OF BETHEL.

The defendants in this case being ordered and directed to plead by the court, deny the truth of the matters contained in the plaintiff's declaration, and under protest puts itself on the court for trial.

By AVERILL AND BREWSTER,
Attorneys for the First National Bank of Bethel.

Plaintiffs likewise.

By TAYLOR AND SEYMOUR,
Their Att'ys.

11 The said National Pahquioque Bank will take notice that on the trial of said case on the issue above pleaded, if the same shall ever come to trial, the said First National Bank of Bethel, while protesting against the right and authority, under any law, of the said Pahquioque Bank to bring, institute, or maintain this or any other action against the said First National Bank of Bethel, in this or any State court, will claim, show, and insist, that this court cannot take, assume, have, or claim any jurisdiction whatever over the First National Bank of Bethel, or any assets thereof, as the subject-matter of this action; that the defendants do and will deny the execution of each and every check, note, draft, bill of exchange, or other paper, included in or referred to in the plaintiffs' oyer or bill of particulars, and each and every indorsement thereof, and will require proof of the execution and endorsement of the same.

That, on or about the 26th day of February, A. D. 1868, on certain legal proceedings had, and upon representations made to the Comptroller of the Currency of the United States, the said Comptroller, under and by authority of the laws of the United States, appointed Edgar S.

Tweedy, esq., receiver of and for the said First National Bank of Bethel; which said appointment was and is in writing, and in the words and figures following, viz:

TREASURY DEPARTMENT,
Office of Comptroller of the Currency, ss:

"Whereas notice having been received by me that the First National Bank of Bethel, Conn., a national banking association formed pursuant to the laws of the United States, and located at Bethel, Connecticut, has failed to redeem its circulating notes when payment thereof was legally demanded at the office of said association; and whereas Henry H. Baird, president of said bank, whose notes were presented for payment, did offer to waive demand and notice of protest, and in pursuance of such offer did make, sign, and deliver to Roger Averill, a notary public, an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof, and said notary public did forward to me the aforesaid admission; and whereas also A. B. Mygatt, a special agent appointed to ascertain whether said association has refused to pay its circulating notes, has reported to me that the association has failed to redeem in lawful money of the
12 United States its circulating notes when payment thereof was legally demanded, during the usual hours of business, at the office of said association:

"Now, therefore, I, Hillard R. Hulburd, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, do hereby appoint Edgar S. Tweedy, of Danbury, Conn., receiver of the First National Bank of Bethel, Conn., with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the act entitled 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864.

"In witness whereof I have hereto subscribed my name, and have caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 26th day of February, in the year of our Lord eighteen hundred and sixty-eight.

"HILLARD R. HULBURD,
"*Comptroller of the Currency.*"

That the said Tweedy immediately entered upon the duties of his said office, and under the direction of said Comptroller, took possession of all the books, records, and all the assets, real and personal, of every name and description, of said National Bank of Bethel, and that under and by virtue of said appointment as such receiver, the said Tweedy has kept, had, and maintained full, entire, and exclusive possession of said books and assets, except such portion of the same as has been delivered to said Comptroller under authority of law, to be disposed of in conformity with the laws of the United States, and such action has been made in the premises as to produce a forfeiture of all the rights and privileges and powers to do any act, or be the subject of any action, which was conferred on said National Bank of Bethel under and by virtue of the law creating it, and at the time these proceedings were instituted against it the said National Bank of Bethel had no legal existence.

That said receiver has been, since the date of his said appointment as such, *as* still is, proceeding, under the direction of said Comptroller and under and by the laws of the United States, to collect, sell, and dispose of the assets of said National Bank of Bethel, preparatory to a just and

legal division of the avails of the same, among the creditors thereof, whose claims have been or shall be proved and allowed against the same by competent authority.

13 That the claim or pretended indebtedness of said National Bank of Bethel to said Pahquioque Bank arose out of transactions that were and are irregular, illegitimate, illegal, fraudulent, and void, between the said Pahquioque Bank, by its president, cashier, and other officers, and William A. Judd, which transactions were not known to, or sanctioned by, the president or board of directors of said National Bank of Bethel, and are and were without authority, and are void, and can in no way bind or affect the First National Bank of Bethel or the assets thereof.

That the said National Pahquioque Bank presented or caused to be presented to said receiver for allowance, a claim sworn to, of which the following exhibit, marked A, is a copy; which claim was by said receiver disallowed.

And that upon a full and final settlement of the lawful dealings and just accounts between the parties to this action the plaintiffs will be found to owe and be indebted to the defendants in a large sum, to wit, five (5) thousand dollars, which sum, if this court takes cognizance and holds jurisdiction of this case, the defendants will claim to recover of the plaintiffs in this action.

Finding by the court.

Superior court, August T., 1869.

STATE OF CONNECTICUT,
County of Fairfield, ss:

THE NATIONAL PAHQUIOQUE BANK OF Danbury.
vs.
THE FIRST NATIONAL BANK OF BETHEL.

The court having heard the parties, with their witnesses and counsel, upon the issue as on file, finds the following facts, viz:

The plaintiffs and defendants were corporations organized as banking associations under the laws of the United States, the former having a capital of two hundred and fifty thousand dollars, and the latter a capital of sixty thousand dollars.

The defendant bank, when the account in dispute commenced, was a corporation for banking purposes, under the laws of this State, and doing business under the name of "The Hatters' Bank," and so continued until the 15th day of March, A. D. 1865, when it was duly

14 converted into a national banking association, under the laws of the United States, under the corporate name of "The First National Bank of Bethel," and as such continued to transact the business of a national banking association until the 21st day of February, A. D. 1868, when it failed to redeem some of its circulating notes which were duly presented for payment, and thereupon appropriate proceedings were had which resulted in the appointment, on the 26th day of February, A. D. 1868, of Edgar S. Tweedy, as receiver, by the Comptroller of the Currency of the United States, which appointment said Tweedy accepted, and, under the direction of the Comptroller, took possession of all the assets of the defendant bank, and was in the exclusive possession

thereof at the commencement of this action, and has ever since continued in such possession. And the said Comptroller caused notice to be published, calling upon all claimants to present and make legal proof of their claims against said bank.

That, subsequent to said notice, and on or about the day of , 1868, the plaintiff bank presented its claim, being the identical claim now in suit, to said receiver for allowance; that the receiver disallowed the same, and gave notice thereof to the plaintiff bank before the commencement of this suit, and make his report to the Comptroller of the Currency, stating his action upon the claims presented to him.

The act of Congress, approved June 3, 1864, as found in Vol. XIII of the Statutes at Large, and all other laws of the United States as far as applicable, are hereby referred to and made part of this finding.

The plaintiffs' claim, contained in the bill of particulars, as on file, is for notes, drafts, and checks sent by the plaintiff bank to the cashier of the defendant bank for collection, of which the plaintiff bank was a holder for collection, but for which notes, drafts, and checks the plaintiff had paid to other banks or individuals from whom the same were received by the plaintiff, the full amount thereof.

During the time that the account in dispute was accruing, one William A. Judd was the regularly-appointed and acting cashier of the defendant bank. Said cashier had no other authority to bind the defendant bank by his acts, than is by law inherent in his office as cashier, and such as may be found or implied from the facts hereinafter stated.

In June, 1865, said defendant bank adopted the following by-law, which has ever since remained in force, viz:

"The cashier of the bank shall be responsible for all monies, funds, and valuables of the bank, and shall give bond with sureties, to be approved by the board, conditioned for the faithful performance of his duties as such cashier."

Also, on the day of June, A. D. 1865, at a meeting of the directors of the defendant bank, the following by-law was adopted, viz:

"There shall be a standing committee, to be known as the exchange committee, consisting of the president, cashier, and one director, appointed by the board, every six months, to continue in office, and to act until succeeded, who shall have power to discount and purchase bills, notes, and other evidences of debts, and buy and sell bills of exchange, and who shall, at each regular meeting of the board, make a report of the bills and notes discounted and purchased by them, since their last previous report."

This by-law was never repealed or rescinded, but, after January, 1866, was practically disregarded, and the cashier was not reappointed, nor did he act as one of said committee.

It was a custom during most of the time the accounts in dispute were accruing, for the cashier of the plaintiff bank, and the cashier of the defendant bank, to strike a balance on the books of their respective banks, of their mutual accounts, as they stood at the beginning and middle of each month; which were adjusted between the cashiers by correspondence, and the transmission of checks and drafts sufficient to balance the same. These semi-monthly balances were usually in favor of the plaintiff bank, and were as represented on the bill of particulars, and were from time to time admitted by said cashier of the defendant bank to be correct; but no other officer and no director of the defendant bank had knowledge of the state of accounts between defendant bank and plaintiff

bank, or of the acknowledgement of said cashier; nor was any authority in fact ever given to make any such acknowledgment, or in any way to recognize the correctness of said account; nor did the books of the defendant bank disclose the true state of said accounts between the parties. The directors of the defendant bank were never consulted, and never took any action or made any inquiry as to the mode of providing for the payment of any balance due to the plaintiff bank, or how such accounts stood between the parties, but said cashier was the only officer of the defendant bank who attended in any way to this branch of the business. The original entries on the plaintiffs' books were all in the name of W'm A. Judd, cashier, but were posted on the ledger to the account of the defendant bank. On the 28th day of February, 1865,
16 there was due from the defendants to the plaintiffs, on account of notes, drafts, and checks sent by plaintiff to defendant bank for collection, a balance of $25,083 17; to provide for the payment of which balance, the said Judd, as cashier of defendant bank, on said day caused to be delivered to the plaintiff bank four drafts, drawn by J. T. Fulton on E. Robinson, and accepted by the latter, and endorsed by Nathan Seeley and said W'm A. Judd, cashier; one of said drafts being dated Feb. 15, 1865, at sixty days, due April 19th, 1865, for $5,000; one draft dated Feb. 20th, sixty days, due April 23, 1865, for $5,000; one dated Feb. 21st, at sixty days, due April 24th, 1865, for $3,000; and one dated Feb. 25th, at sixty days, due April 29th, 1865, for $5,000.

The net proceeds of said drafts amounted to the sum of $17,799 33, which sum was credited to the account of said W'm A. Judd, cashier. Said drafts were not discounted or owned by the defendant bank, and the name of defendants does not appear upon the paper.

Payments to apply on the above drafts were made to the plaintiff, from time to time, by other parties to the paper, than said Judd; and for the balance said drafts were renewed from time to time—all said renewals being indorsed by said W'm A. Judd, cashier, and by Nathan Seeley; but other new parties to said paper were from time to time added, without the knowledge or consent of any officer or director of the defendant bank, except said Judd, cashier. And said new parties to said renewal notes were obtained by the president of the plaintiff bank without the previous knowledge of said Judd. The above drafts, by payments from time to time, had become, at the commencement of this suit, reduced to the sum of $8,900, but none of said payments, either to apply on the principal or interest of said drafts or renewals thereof, were made by said Judd.

Since the suit was commenced a dividend has been received by the plaintiff, on account of said drafts, from the insolvent estates of Nathan and Isaac H. Seeley, amounting to the sum of $1,424 35, leaving a balance now due the plaintiffs from the defendants, upon the account above named of $7,475 65, unless the draft so received as aforesaid, constituted payment of said original account, in contemplation of the law.

There was no agreement between the parties that the plaintiffs should receive them as payment.

Neither the president, directors, nor any officer or agent of the defendant bank except said Judd, cashier, had any knowledge whatever
17 of the aforesaid drafts, or the renewals thereof, or of the indorsement of the same by Judd, cashier; and said Judd had no authority to make such indorsement, unless such authority should be implied by law from the facts herein found; and the books and papers of

the defendant bank contained no entry whatever respecting any of the aforesaid drafts, or the renewals thereof.

And the plaintiff bank never communicated to the defendant bank or its directors, or any of its officers, except said Judd, that any of said drafts, or the renewals thereof, or any part thereof, remained unpaid prior to January, 1868, or that the balance of said account of Feb. 28, 1865, was unpaid; and has never delivered, or offered to deliver, or return to the defendant bank, any of said drafts, or the renewals thereof.

On the 1st of October, 1867, in addition to the above-mentioned claim, the plaintiff bank claimed to W'm A. Judd, cashier of the defendant bank, a balance of $42,431 01, accruing from notes and checks sent by plaintiff to defendant bank for collection. To provide for the reduction of this balance, said W'm A. Judd, as cashier of defendant bank, but without the knowledge or consent of the directors or any officer of the bank, drew five checks on said defendant bank, for five thousand dollars each, three being dated October 4, 1867, and two bearing date of Oct. 5, 1867, all signed W'm A. Judd, cashier, payable to W. P. Seeley, cashier, or order, said W. P. Seeley being at the time, and ever since, the cashier of the plaintiff bank; which checks, amounting in the aggregate to the sum of twenty-five thousand dollars, were credited to W'm A. Judd, cashier, reducing by said sum the aforesaid balance, and charged to the loan account to W'm A. Judd, cashier; and afterwards, to wit, on the 31st day of December, 1867, another check was drawn by said Judd, cashier, for ten thousand dollars, also without the knowledge or consent of the directors, or any officer of the bank, drawn, signed, and payable in the same manner as said first-named five checks, and in like manner credited to W'm A. Judd, cashier, to reduce said balance, and charged to loan account to W'm A. Judd, cashier. No agreement was made between the parties to receive said checks as payment, other than such as may be implied from the facts herein found.

Said checks have never been paid, or any part thereof, and are still held by the plaintiff, and have never been presented to defendant bank for payment, and the plaintiff has never delivered, or offered to deliver, to the defendant bank, any of the aforesaid checks.

The defendant bank, and its officers and directors had never au-
18 thorized said Judd to sign or issue said checks, or any checks whatever, on the defendant bank, and he had no such authority at any time, unless such authority can be implied by law, from the facts herein found. Said Judd was the only officer of the defendant bank, who had any knowledge of the aforesaid balances, or of the balances from time to time, claimed by the plaintiff to be due from the defendant. The books of the defendant were kept by said Judd, and did not disclose the true state of the accounts as claimed by the plaintiff and acknowledged by said Judd.

The items in the plaintiffs' bill of particulars, which are disputed by the defendant, consist of the checks and notes of one Nathan Seeley, which from time to time were sent by the plaintiffs to the said Judd, as cashier of the defendant bank, for collection, which notes and checks were upon the defendant bank or payable thereat, and were all charged to the defendants, unless protested, or notice given to the plaintiffs of non-payment. The cashier of the plaintiff bank had given notice to the cashier of the defendant bank, requesting the latter to protest all such notes and checks as were not paid and return them; but, in fact, a large amount, to wit, the amount of

of the checks, and notes

of said Nathan Seeley, so sent to the cashier of defendant bank for collection, and which were charged to the defendants on the plaintiffs' bill of particulars, were never collected by the defendants, and never paid by said Seeley, and said Seeley had no funds in the defendant bank or elsewhere, from which they could be paid or collected, but such notes and checks were never, at any time, protested for non-payment, or returned to the plaintiffs, nor *was* the plaintiffs in any way, notified of the fact of non-payment, unless such notice may be inferred from the facts herein found. The said notes and checks of said Seeley, which were not paid, were not entered in any way upon any of the books of the defendant bank, and no director, or officer of the defendant bank, other than said Judd, had any knowledge of the existence of any such checks or notes, or that the plaintiff bank had charged to the defendants such notes and checks.

The cashier of the plaintiff bank had never seen an indorsement by Judd, cashier, of any notes or bills, except those held by the plaintiff, and had never seen any checks drawn by Judd, as cashier, upon the defendant bank, except those held by himself.

19 Said Nathan Seeley, during all the time the account in suit was accruing, was a depositor and customer at the plaintiff bank and often overdrew his account.

A considerable portion of the aforesaid checks and notes of said Nathan Seeley, to wit, to the amount of

are embraced in the plaintiffs' account, prior to the giving by said Judd, cashier, of said checks amounting to thirty-five thousand dollars.

Said Judd, as cashier of the defendant bank, a short time before the appointment of said Tweedy as receiver, aforesaid, without the knowledge or consent of any of the other officers of the defendant bank, took from said Nathan Seeley, his, the said Nathan's, note, indorsed by Isaac H. Seeley, for the amount of said notes and checks of said Nathan Seeley, sent to the defendant bank for collection and not collected. Said Tweedy, the receiver of the defendant bank, presented said note of Nathan Seeley against the insolvent estate of Nathan and I. H. Seeley, for the benefit of whom it should concern, and on said note, said Tweedy as receiver of the defendant bank, has, since the commencement of this suit, received a dividend from the insolvent estates of said Nathan Seeley and Isaac H. Seeley, amounting to the sum of

dollars.

(In respect to three foregoing amounts left in blank, if in the opinion of the supreme court of errors, it shall be deemed material to have them filled, the parties may be heard thereon, with further evidence when the case comes back into this court.)

If upon the facts, found as aforesaid, the court shall be of the opinion that the plaintiffs may by law recover in this action the entire account presented in the bill of particulars, then I find the same to be correct, and that at the commencement of this suit, there was, and still is, due from the defendants to the plaintiffs, to balance accounts, the sum of $57,395 84, together with a balance of interest amounting, on the 1st day of March, A. D. 1868, to $929 66, making in all the sum of $58,325 50, with the lawful interest accruing from and after said first day of March, A. D. 1868.

But if the court shall be of the opinion that the drafts or checks aforesaid constitute in law payment, pro tanto, of said account, or if the amount represented by the notes and checks of Nathan Seeley, not

facts found, the defendant bank was liable to the plaintiff bank in said form of action for said paper sent and forwarded by the plaintiff to the defendant for collection, and for the default or negligence of the defendants, or the defendants' agents, in not collecting the same or in not notifying the plaintiff thereof, when it did not and does not appear from the facts found that the said paper in question had been at any time endorsed over to the plaintiff bank by those from whom it came to the plaintiff bank, or that said paper or any of it was endorsed by the plaintiff bank when sent to the defendant bank for collection.

14. That the court erred in holding and deciding that the alleged contract with the defendant bank, made through and by the said dealings of the said cashiers of the said banks could be rescinded in part and still be held good in part, so as to bind the plaintiff in said action.

15. That the court erred in deciding that said action would lie by the plaintiffs in their own name, and not in the names of the original owners of the checks and notes in question.

16. That the court erred in passing judgment in favor of the plaintiff, on the facts found and set out in said finding of the court, in which certain amounts, material to a correct determination of the case, were left in blank and unascertained, and in which the facts of notice, or want of notice, and facts of payment, or non-payment, were left as matters of inference, and to be ascertained as matters of fact from other facts found.

17. That the court erred in deciding for the plaintiffs, because it appears from said finding that the plaintiffs had knowledge of the illegal and unauthorized transactions of the cashier of the defendant bank, out of which the supposed claim of the plaintiffs had its origin.

18. That the court erred in rendering judgment against the defendants, because at the time the said suit was instituted the defendants were not amenable or liable to any action in any court of common law upon any of the said supposed causes of action in the plaintiffs' writ and declaration mentioned.

19. And that the court erred and mistook the law in deciding
24 and rendering judgment for the plaintiff when it should have been rendered for the defendant.

Wherefore the defendant says said judgment ought to be reversed. And the defendant here in court offers to give the adverse party sufficient security by recognizance to pay all damages if defendant fails to prosecute the aforesaid motion to effect, and prays stay of execution.

By AVERILL, BREWSTER, AND GOODRICH.

The above motion is allowed, and Roger Averill is recognized in $100 to prosecute this motion to effect and answer all damage if defendant shall fail to make defendants' plea good.

H. T. BLAKE, *Clerk.*

And the court hereby makes this its certificate as a part of the record in this case, that the plea and notice filed in said case were and are in the due and usual form, according to the legal and statutory course of pleadings and practice in the State of Connecticut; and that said notice, by virtue of the statute law of said State of Connecticut, was equivalent to and stood in place of, and was as much a part of the record in said case as a special plea or pleas at common law could or would be if

duly drawn, and setting up the same defence and state of facts, except that such notice requires no answer and the omission to make answer thereto admits nothing. And that all the matters of defense set up and stated in said plea and notice were in issue in the trial of this case, in the same manner and to the same extent that they would have been if set up and stated in a special plea or pleas at common law; the facts set up in said notice, being found true, in so far forth as the finding of this court herewith annexed and made part of this record, finds them to be true.

And the court farther certifies as a part of the record in this case, that the decision in this case was and is against the claims of the defendants and that judgment has been rendered against them.

MILES T. GRANGER,
Judge of the Superior Court.

25 At a superior court holden at Bridgeport, in and for the county of Fairfield, on the first Tuesday of March, A. D. 1870.

Present, Hon. Miles T. Granger, judge.

The National Pahquioque Bank of Danbury, a corporation, &c., under and by virtue of the laws of the United States, located at Danbury, plaintiff, vs. The First National Bank of Bethel, a corporation under the laws of the United States, located at Bethel, defendant, in an action or plea of the case demanding $100,000 damages, by writ on file dated May 30th, 1868.

This action first came to this court at its August term, 1868, when said parties appeared, and thence by legal continuances to the August term, 1869, when said parties again appeared, and defendants objected to and denied the jurisdiction of the court, but being ordered by the court to plead to the merits filed their plea of the general issue, with notice under protest as on file. And upon said issue said parties having been fully heard before the court and the evidence thereon considered, the court did make a finding of the facts proved on said trial, and did reserve the same and the questions of law arising thereon, and what judgment should be rendered in said cause, for the consideration and advice of the supreme court of errors, next to be holden at Bridgeport, in and for said county, on the 2d Tuesday of October, 1869.

And now at the present term of this court said parties having again appeared, this court in pursuance of the advice of the said supreme court of errors, duly rendered in said cause, found the issue in said cause in favor of the plaintiffs, and thereupon rendered judgment that the plaintiffs recover of the defendants the sum of $65,450 93 damages and their costs taxed and allowed at $, and that execution issue therefor.

And thereupon and within twenty-four hours next after said judgment, the defendants claiming to be aggrieved thereby, made and filed their motion in error in said cause as on file.

Upon consideration this court doth allow said motion, and doth make the certificate appended thereto as a part of the record in said cause, and doth thereupon order that the record in said cause be transmitted,

26 for the revision of the alleged errors therein to the supreme court of errors, next to be holden, by adjournment, in and for said county, at Bridgeport, on the 3d Tuesday of March, 1870, with stay of execution.

Test:

H. T. BLAKE, *Clerk.*

facts found, the defendant bank was liable to the plaintiff bank in said form of action for said paper sent and forwarded by the plaintiff to the defendant for collection, and for the default or negligence of the defendants, or the defendants' agents, in not collecting the same or in not notifying the plaintiff thereof, when it did not and does not appear from the facts found that the said paper in question had been at any time endorsed over to the plaintiff bank by those from whom it came to the plaintiff bank, or that said paper or any of it was endorsed by the plaintiff bank when sent to the defendant bank for collection.

14. That the court erred in holding and deciding that the alleged contract with the defendant bank, made through and by the said dealings of the said cashiers of the said banks could be rescinded in part and still be held good in part, so as to bind the plaintiff in said action.

15. That the court erred in deciding that said action would lie by the plaintiffs in their own name, and not in the names of the original owners of the checks and notes in question.

16. That the court erred in passing judgment in favor of the plaintiff, on the facts found and set out in said finding of the court, in which certain amounts, material to a correct determination of the case, were left in blank and unascertained, and in which the facts of notice, or want of notice, and facts of payment, or non-payment, were left as matters of inference, and to be ascertained as matters of fact from other facts found.

17. That the court erred in deciding for the plaintiffs, because it appears from said finding that the plaintiffs had knowledge of the illegal and unauthorized transactions of the cashier of the defendant bank, out of which the supposed claim of the plaintiffs had its origin.

18. That the court erred in rendering judgment against the defendants, because at the time the said suit was instituted the defendants were not amenable or liable to any action in any court of common law upon any of the said supposed causes of action in the plaintiffs' writ and declaration mentioned.

19. And that the court erred and mistook the law in deciding
24 and rendering judgment for the plaintiff when it should have been rendered for the defendant.

Wherefore the defendant says said judgment ought to be reversed. And the defendant here in court offers to give the adverse party sufficient security by recognizance to pay all damages if defendant fails to prosecute the aforesaid motion to effect, and prays stay of execution.

By AVERILL, BREWSTER, AND GOODRICH.

The above motion is allowed, and Roger Averill is recognized in $100 to prosecute this motion to effect and answer all damage if defendant shall fail to make defendants' plea good.

H. T. BLAKE, *Clerk.*

And the court hereby makes this its certificate as a part of the record in this case, that the plea and notice filed in said case were and are in the due and usual form, according to the legal and statutory course of pleadings and practice in the State of Connecticut; and that said notice, by virtue of the statute law of said State of Connecticut, was equivalent to and stood in place of, and was as much a part of the record in said case as a special plea or pleas at common law could or would be if

duly drawn, and setting up the same defence and state of facts, except that such notice requires no answer and the omission to make answer thereto admits nothing. And that all the matters of defense set up and stated in said plea and notice were in issue in the trial of this case, in the same manner and to the same extent that they would have been if set up and stated in a special plea or pleas at common law; the facts set up in said notice, being found true, in so far forth as the finding of this court herewith annexed and made part of this record, finds them to be true.

And the court farther certifies as a part of the record in this case, that the decision in this case was and is against the claims of the defendants and that judgment has been rendered against them.

MILES T. GRANGER,
Judge of the Superior Court.

25 At a superior court holden at Bridgeport, in and for the county of Fairfield, on the first Tuesday of March, A. D. 1870.

Present, Hon. Miles T. Granger, judge.

The National Pahquioque Bank of Danbury, a corporation, &c., under and by virtue of the laws of the United States, located at Danbury, plaintiff, vs. The First National Bank of Bethel, a corporation under the laws of the United States, located at Bethel, defendant, in an action or plea of the case demanding $100,000 damages, by writ on file dated May 30th, 1868.

This action first came to this court at its August term, 1868, when said parties appeared, and thence by legal continuances to the August term, 1869, when said parties again appeared, and defendants objected to and denied the jurisdiction of the court, but being ordered by the court to plead to the merits filed their plea of the general issue, with notice under protest as on file. And upon said issue said parties having been fully heard before the court and the evidence thereon considered, the court did make a finding of the facts proved on said trial, and did reserve the same and the questions of law arising thereon, and what judgment should be rendered in said cause, for the consideration and advice of the supreme court of errors, next to be holden at Bridgeport, in and for said county, on the 2d Tuesday of October, 1869.

And now at the present term of this court said parties having again appeared, this court in pursuance of the advice of the said supreme court of errors, duly rendered in said cause, found the issue in said cause in favor of the plaintiffs, and thereupon rendered judgment that the plaintiffs recover of the defendants the sum of $65,450 93 damages and their costs taxed and allowed at $, and that execution issue therefor.

And thereupon and within twenty-four hours next after said judgment, the defendants claiming to be aggrieved thereby, made and filed their motion in error in said cause as on file.

Upon consideration this court doth allow said motion, and doth make the certificate appended thereto as a part of the record in said cause, and doth thereupon order that the record in said cause be transmitted

26 for the revision of the alleged errors therein to the supreme court of errors, next to be holden, by adjournment, in and for said county, at Bridgeport, on the 3d Tuesday of March, 1870, with stay of execution.

Test:

H. T. BLAKE, *Clerk.*

THE NATIONAL PAHQUIOQUE BANK OF DANBURY
vs.
THE FIRST NATIONAL BANK OF BETHEL.

The above and foregoing is a true copy of all the files and proceedings and of the record in the above-entitled cause.

Examined and certified by—

H. T. BLAKE, *Clerk.*

27 At a supreme court of errors, holden at Bridgeport, in and for the county of Fairfield, on the 2d Tuesday of October, A. D. 1870.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY, a corporation, &c., under the laws of the United States, located at Danbury, plaintiffs,
vs.
THE FIRST NATIONAL BANK OF BETHEL, A CORPORATION under the laws of the United States, located at Bethel, defendants.

In a motion in error, duly brought from the superior court, holden in and for the county of Fairfield, to this court, as on file.

On motion as aforesaid the record in s'd cause was duly transmitted by the superior court holden in & for s'd county, at its March term, 1870, to this court, holden by adjournment on the 3d Tuesday of March, 1870, to be proceeded with as a writ of error, as by a certified copy of said record on file in this court may appear.

And at said March term, 1870, said parties appeared, and said cause was legally continued to the present term. And now, at this present term of this court, said parties again appeared, and were fully heard, and this court having carefully inspected the record and duly
28 considered thereon, is of opinion and doth adjudge that in said record of the superior court and in the judgment founded thereon there is nothing erroneous; and doth thereupon consider and adjudge that said judgement be, and the same is hereby, affirmed for the full amount thereof, and that the defendants in s'd motion recover of the plaintiffs therein their costs in this court, taxed and allowed at $ and that execution issue therefor.

Test:

HENRY T. BLAKE, *Clerk.*

29 STATE OF CONNECTICUT,
Supreme Court of Errors.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY
vs.
THE FIRST NATIONAL BANK OF BETHEL.

I do certify that in the above-named case there was drawn in question the construction of a statute of the United States, passed June 3d, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the redemption and circulation thereof," and of an authority, and of rights claimed and exercised under the said statute; and that the decision of the court was

against the construction, authority, and rights set up by the defendants under the said act. And this certificate is ordered by the court to be made a part of the record in said suit.

Dated November 4, 1870.

THO'S B. BUTLER,
Chief Judge of the Supreme Court of Errors of the State of Connecticut.

30 STATE OF CONNECTICUT,
County of Fairfield, Supreme Court of Errors, ss:

THE NATIONAL PAHQUIOQUE BANK
vs.
THE FIRST NATIONAL BANK OF BETHEL.

I, Henry T. Blake, clerk of the said supreme court of errors, hereby certify that the above & foregoing is a true copy of all the files and proceedings, and of the record in the above-entitled cause, as on file and of record in said court appears.

In witness whereof I have hereunto set my hand and the seal of said court, at Bridgeport, this 7th day of November, A. D. 1870.

HENRY T. BLAKE,
Clerk of said Court.

(Indorsed:) The First National Bank of Bethel, plaintiff in error, vs. The National Pahquioque Bank of Danbury, defendant in error. C. B. Goodrich, Roger Averill, att'ys for pl'ff in error.

(Indorsement on cover:) No. 315. The First National Bank of Bethel, plaintiff in error, vs. The National Pahquioque Bank. Connecticut sup. court of errors. Filed 29 November, 1870.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY
vs.
THE FIRST NATIONAL BANK OF BETHEL.

The above and foregoing is a true copy of all the files and proceedings and of the record in the above-entitled cause.

Examined and certified by—

H. T. BLAKE, *Clerk.*

27 At a supreme court of errors, holden at Bridgeport, in and for the county of Fairfield, on the 2d Tuesday of October, A. D. 1870.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY, a corporation, &c., under the laws of the United States, located at Danbury, plaintiffs,
vs.
THE FIRST NATIONAL BANK OF BETHEL, A CORPORATION under the laws of the United States, located at Bethel, defendants.

In a motion in error, duly brought from the superior court, holden in and for the county of Fairfield, to this court, as on file.

On motion as aforesaid the record in s'd cause was duly transmitted by the superior court holden in & for s'd county, at its March term, 1870, to this court, holden by adjournment on the 3d Tuesday of March, 1870, to be proceeded with as a writ of error, as by a certified copy of said record on file in this court may appear.

And at said March term, 1870, said parties appeared, and said cause was legally continued to the present term. And now, at this present term of this court, said parties again appeared, and were fully heard, and this court having carefully inspected the record and duly
28 considered thereon, is of opinion and doth adjudge that in said record of the superior court and in the judgment founded thereon there is nothing erroneous; and doth thereupon consider and adjudge that said judgement be, and the same is hereby, affirmed for the full amount thereof, and that the defendants in s'd motion recover of the plaintiffs therein their costs in this court, taxed and allowed at $ and that execution issue therefor.

Test:

HENRY T. BLAKE, *Clerk.*

29 STATE OF CONNECTICUT,
Supreme Court of Errors.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY
vs.
THE FIRST NATIONAL BANK OF BETHEL.

I do certify that in the above-named case there was drawn in question the construction of a statute of the United States, passed June 3d, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the redemption and circulation thereof," and of an authority, and of rights claimed and exercised under the said statute; and that the decision of the court was

against the construction, authority, and rights set up by the defendants under the said act. And this certificate is ordered by the court to be made a part of the record in said suit.

Dated November 4, 1870.

THO'S B. BUTLER,
Chief Judge of the Supreme Court of Errors of the State of Connecticut.

30 STATE OF CONNECTICUT,
County of Fairfield, Supreme Court of Errors, ss:

THE NATIONAL PAHQUIOQUE BANK
vs.
THE FIRST NATIONAL BANK OF BETHEL.

I, Henry T. Blake, clerk of the said supreme court of errors, hereby certify that the above & foregoing is a true copy of all the files and proceedings, and of the record in the above-entitled cause, as on file and of record in said court appears.

In witness whereof I have hereunto set my hand and the seal of said court, at Bridgeport, this 7th day of November, A. D. 1870.

HENRY T. BLAKE,
Clerk of said Court.

(Indorsed:) The First National Bank of Bethel, plaintiff in error, vs. The National Pahquioque Bank of Danbury, defendant in error. C. B. Goodrich, Roger Averill, att'ys for pl'ff in error.

(Indorsement on cover:) No. 315. The First National Bank of Bethel, plaintiff in error, vs. The National Pahquioque Bank. Connecticut sup. court of errors. Filed 29 November, 1870.

REC. 315—2

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 315.

THE FIRST NATIONAL BANK OF BETHEL,

Plaintiffs in Error,

v.

THE NATIONAL PAHQUIOQUE BANK,

Defendants in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

Barker, Cotter & Co., Printers, 14 State Street, Boston.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 315.

THE FIRST NATIONAL BANK OF BETHEL,

Plaintiffs in Error,

v.

THE NATIONAL PAHQUIOQUE BANK,

Defendants in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

PLEADINGS.

On the 30th May, 1868, The National Pahquioque Bank of Danbury, sued out a writ of attachment, to recover $90,000, upon the common counts contained in the declaration, including counts for money paid, and upon an account stated. (Record, pp. 3 and 4.) They filed a bill of particulars, in which they set up two classes of claim, each consisting of an account rendered. They also set forth that they hold certain checks and notes as a part of their evidence of debt against the First National Bank of Bethel. (Record, p. 5.) No service of the writ was made upon the original defendant bank, a copy thereof was given to Edgar S. Tweedy, the receiver, who was not a party to the suit. (Record, p. 4.) The defendant bank appeared, by its attorneys, under protest, who pleaded the general issue, and in accordance with the practice of the Courts of Connecticut, gave notice, in writing, of sundry grounds of defence, in which they denied the right of the National Pahquioque Bank to institute or maintain any suit, in any State Court against the Bank of Bethel; they averred that the State Court could

not entertain any jurisdiction over the said bank or any of its assets; denied the execution, and the indorsement of each and every check, note, draft, bill of exchange, or other paper relied upon. They averred that the Bank of Bethel, at the time of the institution of the suit, and all its assets, were in the hands of a receiver, appointed by the Comptroller of the Currency of the United States; that the claim of the Pahquioque Bank arose out of irregular, illegal and fraudulent transactions of its officers with Wm. A. Judd, Cashier of the Bank of Bethel. That the Pahquioque Bank presented its claim (the same for which they subsequently instituted their suit) to the receiver by whom it was disallowed. They also aver that upon a just settlement of accounts the Pahquioque Bank was indebted to the Bank of Bethel. (Record, pp. 5, 6, 7.)

TRIAL.

The case was heard by the Superior Court, which found the *facts*, (Record, p. 7,) which Court, as it was authorized to do, asked the advice of the Supreme Court of Errors, which was given, and in pursuance thereof judgment was rendered in favor of the Pahquioque Bank, for $65,450.93, which included interest up to the date of the judgment, March, 1870. (Record, p. 15.) Thereupon the Bank of Bethel, by its "motion in error," (a substitute for a writ of error) caused the record to be transmitted to the Supreme Court of Errors for its revision and adjudication thereon. (Record, p. 12, et. seq.) The Supreme Court of Errors, upon hearing, adhered to its previous advice, and affirmed the judgment of the Superior Court, with costs, and directed that execution issue.

Statement of the errors relied upon for a reversal of the judgment.

1. The declaration and the matters therein contained, are not sufficient, in law, for the Pahquioque Bank to maintain their action against the Bank of Bethel.

2. It appears from the record that the judgment has been given for the Pahquioque Bank, against the Bank of Bethel, whereas by law, it should have been for the said Bank, and against the Pahquioque Bank.

3. *There is error in this;* It appears from the record and the facts therein, that the Bank of Bethel, prior to the institution by the defendants in error of their suit, had been dissolved; and its franchise forfeited by a violation of the Act under which it was organized; which is shown by the action of the Comptroller of the Currency of the United States, with the concurrence of the Secretary of the Treasury. By reason of which the judgment is erroneous. *Act of 3d June*, 1864, *Ch.* 106, *Sec.* 8, *and* 46 *to* 50.

4. *There is error in this;* It appears from the record, that the Bank of Bethel, on the 21st of February, 1868, refused to redeem some of its circulating notes, and thereupon, the Comptroller of the Currency of the United States appointed Edgar S. Tweedy, as receiver, who by virtue of his office took possession of the books, records, and assets of every description, of the said bank, and was, under a law of the United States in the exclusive possession thereof, on the 30th of May, 1868, subject to the order and direction of the said Comptroller, at which time the original suit of the Pahquioque Bank was instituted; which action of the Comptroller had not, and has not been enjoined by any Circuit or District Court of the United States; so that the Court in which the suit was originally instituted, at the time of its institution, had not and could not entertain any jurisdiction over the Bank of Bethel, its assets, books or records, and should have dismissed the said suit for want of jurisdiction.

Finding of the Court, record, p. 7.

5. *There is error in this;* It appears from the record and the facts therein contained, that at the time the Pahquioque Bank instituted its suit against the Bank of Bethel and directed the attachment of its assets, the said bank had been, and was lawfully prohibited from paying, or satisfying, any of its creditors; by reason of which prohibition, and disability to pay, the said bank could not be impleaded, sued or attached by any action at law, by the said Pahquioque Bank.

6. *There is error in this;* It appears from the record that the Comptroller of the Currency of the United States caused notice to be published, calling upon all claimants to present, and make legal proof of their claims against the Bank of Bethel; That the Pahquioque Bank, in pursuance of such notice presented its claim to the receiver by whom the same was disallowed, and a report of such disallowance made

to the Comptroller, and notice thereof given to the Pahquioque Bank, before the institution of its suit; so that the said bank became party to the winding up of the Bank of Bethel, under the direction of the Comptroller, and could not thereafter institute, or maintain, any suit at law, to revise, correct, or control the finding of the receiver.

7. *There is error in this;* It appears from the record and the facts therein, that the Pahquioque Bank received for collection without interest, compensation or reward, sundry notes, checks and drafts made by one Nathan Seeley, and remitted the same to the Bank of Bethel for collection, without interest, compensation or reward; that the said notes, checks and drafts were not collected; by reason whereof the Bank of Bethel did not in any way become liable or responsible to the Pahquioque Bank, which was merely a collecting agent for the owner or owners, of the unpaid paper of Nathan Seeley; so that the judgment should have been in favor of the Bank of Bethel.

8. *There is error in this;* It appears from the record and the facts therein, that the Pahquioque Bank, at or before the institution of its suit, had not paid, laid-out, or expended any sum or sums of money at the special instance and request of the Bank of Bethel, or for its use; for which reason the judgment is erroneous.

9. *There is error in this;* It appears from the record and the facts therein, that Wm. A. Judd, Cashier, had no authority to make "an account stated," or to admit the correctness of such an account based upon, and growing out of claims for uncertain damages arising from his neglect to return or to notify the Pahquioque Bank, of the non-payment of checks, notes and drafts of Nathan Seeley, which had been sent to said Judd, for collection; for which reason the judgment upon a supposed "account stated," is erroneous.

10. *There is error in this;* It appears from the record and the facts therein, that Wm. A. Judd, Cashier, had no authority to bind the Bank of Bethel by indorsing notes or drafts, owned by Nathan Seeley, of which the bank was not the holder, and in which it had no interest, which were received by the Pahquioque Bank in payment of the uncollected notes, checks and drafts of Nathan Seeley; for which reason the Court erred in giving effect, to such indorsement, for any purpose.

11. *There is error in this;* It appears from the record and the facts therein, that Wm. A. Judd had no authority to issue his checks, as cashier, upon the bank of which he was cashier, and thereby bind the bank, by the use of such checks to cover up and conceal his fraud and neglect of duty; and the Court below erred in giving any effect to such checks.

12. *There is error in this;* It appears from the record and the facts therein, that the claims of the Pahquioque Bank, as set forth in their declaration and bill of particulars, had been fully paid and extinguished before the institution of their suit; for which reason the judgment should have been in favor of the Bank of Bethel.

13. *There is error in this;* It appears from the record and the facts therein, that the Pahquioque Bank did not return to Wm. A. Judd, Cashier, or to the Bank of Bethel, the drafts and notes of Fulton, the checks of Judd, Cashier, before the institution of their suit; for which reason the judgment is erroneous.

14. *There is error in this;* It appears from the record and the facts therein, that Nathan Seeley had no funds at the Bank of Bethel, or elsewhere, with which to pay his notes, checks and drafts sent to said bank for collection; so that judgment is erroneous, insomuch as it was rendered for the full amount of the uncollected paper, when in law, it should have been rendered, only for nominal damages.

15. The Court erred in allowing interest after the appointment of a receiver.

16. *There is error in this;* It appears from the record, and from the "Facts Found," that the accumulation, at the Bank of Bethel, of the unpaid notes, checks and drafts of Nathan Seeley, sent to the said bank for collection, by the Pahquioque Bank, was produced by, and resulted from the gross fraud of Wm. A. Judd, Cashier, he acting in collusion with said Seeley, the maker of the uncollected paper; it also appears from the "Facts Found" that the said fraud, and collusion of Judd, and Seeley, was known to the officers of the Pahquioque Bank, on and before the 28th of February 1865; to which fraud and collusion they contributed by continuing, after the said 28th of February, to send to the

said Wm. A. Judd, Cashier, for collection, a large amount of the checks, notes and drafts of the said Nathan Seeley, well knowing he had no funds at the Bank of Bethel, or elsewhere, with which to pay them; by reason of all which, the judgment of the Supreme Court of Errors, for the State of Connecticut, *as matter of law*, should have been in favor of the Bank of Bethel, and against the Pahquioque Bank.

POSITIONS.

I. Banking Associations under the Act 3d June, 1864, Ch. 106, have been established as instruments by which the government may perform some of its trusts. They are controlled by the Treasury Department. They are allowed to receive from the Comptroller of the Currency, notes which they may circulate as money. They cannot issue any instrument for circulation or use as money, or as a substitute for money, except the notes entrusted to them by the Comptroller. (Sec. 22 and 23.) Their existence, as bodies corporate, can be sustained under the Constitution, only, because they may be employed by the Government in the execution of its functions. The Act imposes upon the Comptroller of the Currency certain duties of a public character; to perform which he is clothed with certain powers; these powers must be regarded as rightfully conferred by Congress, or the Comptroller cannot perform his duty, and the act becomes a nullity. The act, it is submitted, is constitutional, and should receive a construction in harmony with its object, which will render it efficient to an accomplishment of the purpose for which it was enacted.

A. The rights of the parties litigant depend upon, and are to be ascertained from statutes of the United States, and general principles of law applicable to the questions which arise upon the "Facts Found."

The legality and propriety of the supervision and control which is exercised by the Comptroller of the Currency of the United States over National Banking Associations, and the effect of his acts in relation thereto, are to be determined, *exclusively*, by the laws of the United States; the construction of which is ultimately to be given by the Courts of the United States.

II. An association under the Act 3d June, 1864, Ch. 106, Sec. 8, shall have succession, (corporate existence) for the period of twenty years from its organization, *unless sooner dissolved:* (first,) according to the provisions of its articles of association, or, (second,) by the act of its stockholders owning two-thirds of its stock, or, (third,) *unless the franchise*, (which consists in a right of banking,) *shall be forfeited by a violation of the act.* When an association is voluntarily closed by the action of its stockholders, (Sec. 42,) without interference by the Comptroller, no receiver is appointed. There are five causes or different violations of the act, (Sec. 12, 15, 31, 32, 46 to 50 inclusive,) for and upon any one of which the Comptroller has a right to act summarily, without the aid of any judicial tribunal, upon such evidence as the act prescribes, by the appointment of a receiver, the effect of which appointment is to divest the body corporate of its franchise of banking, and of every its corporate capacities. The action and judgment of the Comptroller, in this respect, is final and conclusive, unless he shall be enjoined by a circuit, or district, or territorial court of the United States, as he may be by proceedings instituted under Section 50.

There is another cause of dissolution, *for a violation of the Act*, based upon the misconduct of the directors, upon proof of which they are personally responsible for all damages, and the body corporate may be dissolved by judicial decree. (Sec. 53.) For such violation of the act, a suit is to be instituted before a proper circuit, district, or territorial court of the United States, in the name of the Comptroller of the Currency; (against whom must be determined by implication,) but no receiver is appointed. *The exercise of its franchise of banking* during the pendency of the suit, and the management by the bank of its business, is not suspended; its assets are not seized. This section does not apply, and cannot be applied, to the five different violations of the act, (Sec. 12, 15, 31, 32, 46 to 50 inclusive,) upon each and every one of which the Comptroller, without suit, may proceed summarily to close up the affairs of an association, by means of a receiver and seizure of its assets, unless enjoined in the manner above stated.

The Bank of Bethel committed a violation of the act on the 21st of February, 1868, at which time it failed to redeem some of its circulating notes; which failure was duly ascertained by the Comptroller of the Currency, who, on the 26th of February, acted threupon, by the appointment of a receiver. (Finding of the Court, Record, p. 7.) This action of the Comptroller was not enjoined by any district, circuit, or territorial

court of the United States; the only courts competent to enjoin or act in the matter, as provided in Section 50 of the Act. (See also Sec. 57.) The result is that the power of succession (corporate capacity,) ceased to exist prior to the 30th May, 1868, at which time the defendants in error instituted their suit. (Record, p. 3 and 4.) In the language of the 8th Section, the association had forfeited its franchise, (the right of banking,) by a violation of the act, which was duly ascertained, and acted upon by the Comptroller, whose judgment and discretion in this respect, he not having been enjoined, is conclusive. The association was dissolved; the receiver was clothed with power to reduce the assets to money, by suit in his own name; was directed to pay the money to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, for the use of those entitled as creditors, giving priority of payment to the United States; the remainder or surplus of the proceeds, after the payment of debts, to be paid by the Comptroller to the *shareholders* of the association or their legal representatives, in proportion to the stock by them respectively held; *and not to the association in its corporate capacity.*

A. The dissolution of a corporation occurs by lapse of time; it may occur by legislative or judicial action. It is competent for the sovereignty, under whose authority a corporation is established, to provide that a forfeiture of the franchise, and a dissolution consequent thereon, may be ascertained and declared by any public officer; the body corporate, as grantee, and those who have transactions with it, have no just or legal grounds of objection; this is especially true in relation to a corporation created for public purposes, and which is authorized to circulate its notes as money.

Verplanck v. *Mer. Ins. Co.*, 2 Paige, Ch. Rep. 452. "The receiver is absolutely vested with all the property and effects of the corporation. *The final order operates as a virtual dissolution of the corporation.*"

Edwards on Receivers, Ed. 1839, *p.* 225. Receivers appointed under the statute relative to insolvent companies and those that have infringed their charter, are, unless restricted and controlled by the Court, absolutely vested with all the property and effects of the corporation, and have full power to sell and dispose of the whole at their discretion, and to distribute the proceeds among the stockholders, after paying the

debts owing by the company. *It is in effect a final order in the cause, and unless altered or revoked, operates as a virtual dissolution of the corporation.*

Greeley v. *Smith*, 3 Story Rep. 657. "Where, during the pending of a suit, a corporation surrenders its charter, which is accepted by the Legislature, it becomes defunct and the suit abates, unless the Legislature by some act saves the right of action against the corporation"—p. 658. "The attorney for the corporation may well suggest the death of the corporation by plea or otherwise, on the record, and if the fact is admitted the suit as to the corporation will abate by operation of law and render all further proceedings against it void."

Mumma v. *the Potomac Company*, 8 Peters, 281, 86, 87. The 13th section of the act of Virginia, incorporating the C. and O. Canal Company, declares, that upon such surrender and acceptance, "the charter of the Potomac Company shall be and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated." By this provision the Potomac Company ceased to exist, and a *scire facias* on a judgment obtained against the company before it was so determined cannot be maintained. There is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.

"A corporation by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, *and by a forfeiture of them for wilful misuser and nonuser.* Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

Bacon v. *Robertson*, 18 How. 480.
Lum v. *Robertson*, 6 Wallace, 277.

B. The notice to the Bank of Bethel, which the Comptroller gave, under Sec. 46, as he was not enjoined by any Circuit or District Court of the United States, operated as a suspension of the franchise of the

bank, which consisted in the right of prosecuting the business of banking, (see also Sec. 52.) This suspension, by the subsequent appointment of a receiver, became absolute, and in the language of the Court in the cases cited, must be regarded as a *final order*, the effect of which was a dissolution of the body corporate, with a transfer of its assets, for the use of the United States, the creditors and shareholders of the bank, they taking according to their several priorities.

(Finding of the Court, Record, p. 7.)

C. Upon the intimation of a supposed failure of a banking association, organized under the laws of the United States, to redeem its circulating notes, the Comptroller of the Currency, with the approbation of the Secretary of the Treasury, is authorized to appoint a special agent to ascertain and report the fact, and thereupon if the default is satisfactorily made out, the Comptroller is authorized to declare the United States bonds, which the association had deposited as security for its circulation, forfeited; which declaration, by its own force, constitutes a forfeiture—(Sec. 47, 48, 49.) It is equally clear that the Comptroller, if not enjoined by a Court of the United States, may appoint a receiver, and his action, in this respect, is conclusive and binding upon all parties in interest.

Angell on Corporations, Sec. 613, 8th Edi. "Where it is provided in an act creating a corporation, that the individuals composing it shall be liable at the time of the *dissolution* of the company for the debts then due, any inability of the company by reason of *a total want of funds*, to exercise its corporate powers, will be deemed a dissolution. It is not necessary in such a case that the corporate rights should be regularly adjudged forfeited by any tribunal before a creditor can maintain a suit against a stockholder.

Penniman v. *Briggs*, 1 Hopkins, Ch. Rep. 300, 302. "*A mere omission* to exercise a corporate franchise is not a forfeiture of the franchise or a dissolution of the corporation. But this is not merely a case of omission to exercise corporate rights. Besides the omission to use the corporate powers, here is an entire inability to exercise them, by reason of a total want of funds." The Court held that a judicial decree of dissolution was not required to enable a creditor to maintain suit against a stockholder, who was liable for the debts of a corporation which existed at the time of its dissolution.

In the case at bar, the Bank of Bethel has been deprived of its assets; has been, by the action of the Comptroller, prohibited from the exercise of any of its franchises. This action of the Comptroller must be regarded as having received judicial sanction, insomuch as he has not been restrained in the manner provided in the act, section 50.

III. On the 30th May, 1868, at which time the defendants in error commenced their suit, the Bank of Bethel had no authority to pay, was prohibited from paying, *any creditor;* it had no means within its control with which to pay. If the bank had authority, after notice by the Comptroller, under Sec. 46, to pay a creditor, it might by such payment defeat the provision of the act, (Sec. 50,) which gives to the United States, from the assets of the association, priority of payment, for any deficiency in the redemption of its circulating notes after applying the bonds deposited for their redemption. (Sec. 16.) It results from the want of authority, to pay a creditor, at the time the suit by the defendants in error was instituted, that no suit at law, in any court, State or National, could be instituted against the Bank of Bethel. (Sec. 46–52.)

Atlas Bank v. *Nahant Bank*, 23 Pick. 480.
Hubbard v. *Hamilton Bank*, 7 Met. 340.

A. If a creditor after the appointment of a receiver, may institute a suit, in a Court of Law, every creditor can, and by such course of proceeding disregard the winding up under the direction of the Comptroller. The Comptroller, under Sec. 50, it is submitted, after giving notice for three consecutive months, calling upon all persons who may have claims to present the same, and to make legal proof thereof, may distribute the money paid by the receiver, into the treasury, subject to the order of the Comptroller, to those who may have made such proof, and if no creditor has proved to his satisfaction, may distribute it to the shareholders. The fact that the defendants in error caused a copy of their writ of attachment to be given to the receiver, does not bind the assets, in his hands, cannot impede the action of the Comptroller, or have the force and effect, indirectly, of an injunction which the State Court could not grant. (Sec. 57.)

Case v Terrell 11 Wallace 199

Section 46. "And after such default, (non-payment of circulating notes,) on examination of the facts by the Comptroller, and notice by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes or bills, *or otherwise prosecute the business of banking*, (which constitutes its franchise,) *except to receive and safely keep money belonging to it, and to deliver special deposits.*

Section 52. "That all transfer of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or *creditors*; and all payments of money for either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

B. The sections cited show very clearly that the Bank of Bethel could not, on the 30th of May, 1868, by its cashier, or any other officer, confess, or authorize to be confessed, a judgment against the bank, binding upon the judgment of the Comptroller. or upon the stockholders of the bank.

Heath v. *Chadwick*, 2 Phillips, 649, 651. "Creditors of an insolvent cannot maintain a suit respecting property or rights alleged to have belonged to the insolvent and to be vested in his assignee under the Insolvent Debtor's Acts, upon an allegation of collusion between the assignee and the party against whom the relief is prayed; and the same rule applies to suits for a similar object by the insolvent himself."

Rockport v. *Battersby*, 2 House of Lords Cases, 388. "An insolvent debtor has not such an interest in property assigned under the Insolvent Debtor's Acts, as to entitle him to enter into any litigation concerning it."

Wiswall v. *Sampson*, 14 How. 52.
Peale v. *Phipps*, 14 How. 368–74–75.
Vaughn v. *Northrop*, 15 Peters, 1.
Williams v. *Benedict*, 8 How. 107.
Harris v. *Dennie*, 3 Peters, 292, 304, 305.

C. It is provided in Section 50 that "the Comptroller, (after the appointment of a receiver,) shall cause notice to be given, calling on all persons who have claims against such association to present the same and make legal proof thereof." It then directs the Comptroller, after providing for any deficiency due to the United States, to make a ratable dividend of the money subject to his order, on all such claims as may have been proved to his satisfaction, "*or adjudicated in a court of competent jurisdiction.*"

These words must be construed with reference to the purpose and provisions of the section, in connection with the other provisions of the act of which they constitute a part; they were not designed to control the provisions of the act, which authorized the Comptroller, in five different cases, (Sec. 12, 15, 31, 32, 46 to 50,) to wind up the affairs of an association, by reason of certain violations of the act, to be ascertained by himself in the mode prescribed by the act. They were not designed to authorize the claimants to institute suits in a court of law against the Comptroller, to determine the validity of their claims. (Sec. 57, Proviso.) They were not designed to authorize the institution of suits against a banking association after the appointment of a receiver, to which the Comptroller is not made and cannot be made a party.

These words can have full force and effect by applying them to adjudications against a bank, which may have been made prior to any action by the Comptroller. When so made, the Comptroller is clothed with authority to determine whether they were made by a court of competent jurisdiction. Any other construction of the act, it is submitted, will defeat the winding up for which the act provides, and render it nugatory. A claimant cannot, by an attachment, arrest the assets of a bank in the hands of a receiver appointed by the Comptroller; such receiver, in this respect, has all the exemptions and immunities of any receiver, by whatever authority appointed.

United States v. *Kirby*, 7 Wallace, 486. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, shall prevail over its letter."

U. States v Caldwell 6. Wallace 396

United States v. *Bassett*, 2 Story Rep. 389. Statutes are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provisions nor inconsistent with the objects of the statute.

Brewer v. *Blougher*, 14 Peters, 178. "It is the duty of the Court to ascertain the meaning of the Legislature, from the words used in the statute and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to include in it."

Morgan v. *Thornhall*, 11 Wallace, 81. "Adopt the theory of the appellees and the proceedings in bankruptcy might be protracted indefinitely, as every question arising may be transferred to the Circuit Court, then to this court, which would tend very largely to defeat all the beneficent purposes of the bankrupt act."

United States v. *O'Keefe*, 11 Wallace, 184. "We cannot impute to the Legislature an intention that would produce such a result, in the absence of an express declaration to that effect."

Amy v. *Supervisors*, 11 Wallace, 136, 138. "The State and National courts are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. Where either is in possession of the *res* sought to be reached, the process of the other must pause until that possession has terminated."

The doctrine of this case is applicable with equal or greater force to the state and national sovereignties; the possession by the one cannot be disturbed by the other.

D. The objection that no suit or action can be sustained against the defendants, is open, by plea in bar, or under the general issue. If the fact of inability to be sued, or the want of jurisdiction, *in any court*, to sustain an action, come to the knowledge of the Court in which a suit may be instituted, in any way, the Court will not proceed to judgment.

The objection is peremptory and not dilatory in its character. Notice under the general issue, is in effect a special plea in bar.

1 *Chitty on Pleading*, 440, note *C*, 9th Am. Ed., also, p. 441, and note *C*.
West v. *Turner*, 6 Adol. and Ellis 614.
Same case, 1 Nevile & Perry, 612.
Parker v. *Elding*, 1 East. 352.
Taylor v. *Blair*, 3 D. & E., 452.
The King v. *Johnson*, 6 East. 583.
Crisp v. *Bunbury*, 8 Bing. 394.
The King v. *The Trustees, &c.*, 2 Nevile and Perry, 278.
Mason v. *Eldred*, 6 Wallace, 231.
Osborn v. *Bank of United States*, 9 Wheaton, 738.

IV. After an association has been placed in the hands of a receiver, the statute prescribes the mode of *winding up*, which includes an ascertainment of the creditors, and the amount severally due to them. This mode of proof excludes all others. This cannot be doubted, except by holding that the act, (Sec. 12, 15, 31, 32, 46 to 50,) conferring authority upon the Comptroller of the Currency to appoint a receiver; to receive proof of claims; to wind up the affairs of the corporation are unconstitutional. The voluntary winding up (Sec. 42) and the dissolution which is provided for under Section 53, by judicial action, as already stated, depend upon different considerations.

Murray v. *Bridges*, 1 Barn. and Adol. 589.
Stevens v. *Evans*, 2 Burrows, 1157.
Cates v. *Knight*, 3 D. and E. 442.

Kennedy v Gibson et al 8 Wallace 498
Carey v Curtis 3 How 236

V. The defendants in error, prior to the commencement of their suit; subsequent to the notice given, and to the appointment of a receiver by the Comptroller, who called upon all claimants to present and make legal proof of their claims, presented the claim which is now in suit to Edgar S. Tweedy, the receiver of the First National Bank of

Bethel, by whom it was disallowed; he reported his action, in this respect, to the Comptroller, and to the defendants in error. By this presentation the Pahquioque Bank made itself party to the winding up of the Bank of Bethel under the direction of the Comptroller. If they had, originally, a right of election of remedy, which is not admitted, they exercised the right, and could not, thereafter, institute a suit against the corporation; certainly not in a court of common law, or in any State court, for the purpose of reversing, or of reviewing the disallowance. (Record, p. 8, near the top.)

Gilman v. *Lockwood*, 4 Wallace, 409. Certificates of discharge under insolvent laws passed by a State, cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, *unless it appear that the plaintiff proved his debt* against the defendant's estate in insolvency, or in some manner *became a party* to the proceedings.

Baldwin v. *Hale*, 1 Wallace, 223.
Baldwin v. *Bank of Newbury*, 1 Wallace, 234, 239.
Suydam v. *Broadnax*, 14 Peters, 75.
Hopkins v. *Lee*, 6 Wheaton, 109.
Kendall v. *United States*, 12 Peters, 524, 611, 612.
Kendall v. *Stokes*, 3 How. 87, 96, 97.
Goodrich v. *The City (of Chicago,)* 5 Wallace, 566.

Hardcastle v Shields 4 Brown, C.C. 183
Clay v Smith 3 Peters 411

VI. If the First National Bank of Bethel is responsible for its supposed neglect of duty in relation to the collection of the notes, checks, and drafts of Nathan Seeley, which were not paid, they can be charged only upon a special action on the case, in a suit or suits, in the name of the person or persons who owned the uncollected paper at the time the breach of duty occurred. The plaintiffs in error are not responsible to the defendants in error, who were merely collecting agents, without interest, compensation or reward. This cannot be controlled by the fact that the Pahquioque Bank, after the supposed neglect of duty had occurred, voluntarily paid the amount of the unpaid checks, etc., to its correspondents, unless it has been shown that they so paid, at the request of the Bank of Bethel, made by some person, having authority, in this

respect, to bind the bank; no facts are stated, in the finding of the Court, from which it can be inferred that the Pahquioque Bank was authorized by the Bank of Bethel to pay the uncollected notes, checks, and drafts of Nathan Seeley. The Pahquioque Bank, as collecting agent, had a right to transmit the paper for collection, to the place at which it was payable. If it performed its duty in this respect, it was not responsible for the negligence of the Bank of Bethel.

Ward v. *Smith*, 7 Wallace, 447, 451. "When an instrument is lodged with a bank for collection, the bank becomes the agent of the payee, or obligee to receive payment."

Fabens v. *Mercantile Bank*, 23 Pick. 330. If a note deposited in a bank for collection is payable, or the promisor resides in another place, and no agreement made for compensation, and the bank seasonably transmits the note to a suitable bank in such other place for collection, the former bank is not responsible for the misfeasance or negligence of the latter bank, and it makes no difference that the note was received by the former bank as collateral security. It seems *the owner*, in such case, has his remedy against the bank guilty of the misfeasance or negligence.

Wilson v Smith 3. Hun 763

Phipps v. *Millbury Bank*, 8 Met. 79–82. Same doctrine recognized, and the suit was a special action on the case in the name of the owner.

Lawrence v. *Stonington Bank*, 6 Connec. 54. Action of assumpsit. The plaintiff, residing in New York, made a draft payable to his own order, upon a person in Stonington. He placed it in a bank at New York for collection. The cashier indorsed, and sent it to the Eagle Bank, at New Haven, for collection, the cashier of which indorsed and sent it to the defendants for collection, to which it was paid by the drawee. The defendant retained the money to the credit of the Eagle Bank, against which it had a claim. The drawer and owner of the draft brought suit against the defendants to recover the sum so paid to them, as money received by the defendants to the use of the plaintiff. The Court held that parol evidence was admissible to show the nature of the indorsements by the banks through which the draft had passed, and to show the purpose for which they were made. The Court also held that the Stonington Bank was not the factor of the Eagle Bank;

that the defendants had not, as agents, or in any other capacity, a lien on the avails of the bill for the general balance of its account with the Eagle Bank, by virtue of which it was entitled to set off such avails against such balance.

Campbell v. *Royal Bank, Scotland*, 2 Dunl. and Bell, 1010. Same doctrine. *Lord Moncrief* went upon the ground "that the bill was given to the bank simply and exclusively for the gratuitous purpose of being negotiated. It was more an office of friendship than anything else that the bank undertook. Under these circumstances, there being no blame attached to the negotiators, the money which was lost in the hands of the person whom they, (the defendants,) seasonably and prudently employed in Calcutta, perished to the owner."

Mackersey v. *Ramsays*, 9 C. and F., 818–28–29–44–50. The principle upon which the case last cited was decided, is sanctioned, but the case before the Court was distinguished. *Lord Campbell*, p. 844, in giving judgment says, "It appears that Ramsay and Company, in the way of their business as bankers, were employed, for *reward*, by a customer with whom they had a cash account, to obtain payment of a bill, and they did not become the owners of the bill or discount it, but they were to receive payment of it for Mackersey, *having a lien on the bill* and its proceeds for any balance due to them from him, Mackersey, not to interfere," etc. *Lord Cottingham*, p. 850, "Ramsay and Company agreed for *consideration* to apply for the payment of the bill. They necessarily employed agents for that purpose, who received the amount. The appellant with whom they so agreed cannot have any thing to do with the conduct of those whom they so employed, or with the state of the account between the different parties engaged in this agency."

In this case a bill was drawn upon a person in Calcutta. Ramsay and Company sent it to Coutts and Company, their correspondents at London, by whom it was forwarded to their agents at Calcutta, who received the money and retained it for some five months, and failed without remitting.

The judgment of the Court is placed upon the ground that the defendants undertook to collect the bills for a consideration, and that the plaintiff had a right to consider the money when paid to the agents at Calcutta, as paid to the defendant for his use.

Browne on Actions at Law, p. 106. In actions for torts or wrongs, as well as upon contracts, the party to be plaintiff is the person whose legal right has been affected.

Same, p. 519. The party to be plaintiff is the person who was legally entitled to the money when defendant received it. A mere agent, not having any interest in the money, cannot be plaintiff, as he has no privity.

Dawes v. *Peck*, 8 D. & E. 332. This question, (the right of suit,) must be governed by the consideration, in whom the legal right was vested; for he is the person who sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured.

Bank of Washington v Triplett
Mechanics Bank v Corp. of

VII. The Pahquioque Bank declares upon the common counts, including an "account stated" and money paid; neither of which can be sustained upon the facts found. No one, having authority, in behalf of the Bank of Bethel, after its supposed neglect to make collection, requested the Pahquioque Bank to pay the amount of the uncollected paper to the owners thereof, and by so doing change the character and amount of the liability. No "account stated" was ever made, or rendered, by or to the Bank of Bethel; the admission of Judd, (Record p. 8, at close,) that the semi-monthly balances, which were paid, were correct, does not constitute "an account stated," in relation to the uncollected paper.

A. Judd, as cashier, had no authority to bind the Bank of Bethel by changing a special liability for damages of an uncertain character, into an absolute promise to pay a sum certain. Especially he had no authority to settle a claim arising from his negligence and wrong doing, and thereby increase the liability of the bank.

B. Judd, Cashier, had no authority to bind the Bank of Bethel, by indorsing, for the accommodation of Nathan Seeley, the drafts and

that the defendants had not, as agents, or in any other capacity, a lien on the avails of the bill for the general balance of its account with the Eagle Bank, by virtue of which it was entitled to set off such avails against such balance.

Campbell v. *Royal Bank, Scotland*, 2 Dunl. and Bell, 1010. Same doctrine. *Lord Moncrief* went upon the ground "that the bill was given to the bank simply and exclusively for the gratuitous purpose of being negotiated. It was more an office of friendship than anything else that the bank undertook. Under these circumstances, there being no blame attached to the negotiators, the money which was lost in the hands of the person whom they, (the defendants,) seasonably and prudently employed in Calcutta, perished to the owner."

Mackersey v. *Ramsays*, 9 C. and F., 818–28–29–44–50. The principle upon which the case last cited was decided, is sanctioned, but the case before the Court was distinguished. *Lord Campbell*, p. 844, in giving judgment says, "It appears that Ramsay and Company, in the way of their business as bankers, were employed, for *reward*, by a customer with whom they had a cash account, to obtain payment of a bill, and they did not become the owners of the bill or discount it, but they were to receive payment of it for Mackersey, *having a lien on the bill* and its proceeds for any balance due to them from him, Mackersey, not to interfere," etc. *Lord Cottingham*, p. 850, "Ramsay and Company agreed for *consideration* to apply for the payment of the bill. They necessarily employed agents for that purpose, who received the amount. The appellant with whom they so agreed cannot have any thing to do with the conduct of those whom they so employed, or with the state of the account between the different parties engaged in this agency."

In this case a bill was drawn upon a person in Calcutta. Ramsay and Company sent it to Coutts and Company, their correspondents at London, by whom it was forwarded to their agents at Calcutta, who received the money and retained it for some five months, and failed without remitting.

The judgment of the Court is placed upon the ground that the defendants undertook to collect the bills for a consideration, and that the plaintiff had a right to consider the money when paid to the agents at Calcutta, as paid to the defendant for his use.

Browne on Actions at Law, p. 106. In actions for torts or wrongs, as well as upon contracts, the party to be plaintiff is the person whose legal right has been affected.

Same, p. 519. The party to be plaintiff is the person who was legally entitled to the money when defendant received it. A mere agent, not having any interest in the money, cannot be plaintiff, as he has no privity.

Dawes v. *Peck*, 8 D. & E. 332. This question, (the right of suit,) must be governed by the consideration, in whom the legal right was vested; for he is the person who sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured.

Bank of Washington v Triplett 1 Peters 25
Mechanics Bank v Corp. 4. Wheat 334

VII. The Pahquioque Bank declares upon the common counts, including an "account stated" and money paid; neither of which can be sustained upon the facts found. No one, having authority, in behalf of the Bank of Bethel, after its supposed neglect to make collection, requested the Pahquioque Bank to pay the amount of the uncollected paper to the owners thereof, and by so doing change the character and amount of the liability. No "account stated" was ever made, or rendered, by or to the Bank of Bethel; the admission of Judd, (Record p. 8, at close,) that the semi-monthly balances, which were paid, were correct, does not constitute "an account stated," in relation to the uncollected paper.

A. Judd, as cashier, had no authority to bind the Bank of Bethel by changing a special liability for damages of an uncertain character, into an absolute promise to pay a sum certain. Especially he had no authority to settle a claim arising from his negligence and wrong doing, and thereby increase the liability of the bank.

B. Judd, Cashier, had no authority to bind the Bank of Bethel, by indorsing, for the accommodation of Nathan Seeley, the drafts and

notes of Fulton, of which the bank was not the holder, and in which it had no interest. He had no authority to make his checks, ($35,000,) as cashier, from time to time, upon the Bank of Bethel, to de discounted, and the proceeds applied, by the Pahquioque Bank, to the payment of the uncollected notes checks and drafts of Nathan Seeley, or thereby to cover his fraud. The checks, which were, by their terms, payable upon presentation, were not presented for payment, although ample time had elapsed, before the failure of the bank. It follows, that the checks and indorsements of Judd, do not, and cannot sustain "an account stated" or the count for money paid.

C. The corporation, by its directors, had no authority to bind the Bank of Bethel by an accommodation indorsement, and thereby impose upon the shareholders, liabilities not contemplated by the charter.

Runyan v. *Carter*, 14 Peters, 129.
Perrine v. *Chesapeake*, 9 How. 184.
Beaty v. *Knowler*, 4 Peters, 168.
Head v. *Providence Ins. Co.* 2 Cranch, 127.
Bank of United States v. *Dandridge*, 12 Wheat. 64.
Bank of Augusta v. *Earle*, 13 Peters, 587.

D. If the Pahquioque Bank has any cause of action, in its own name, it arises from the fraud and negligence of Judd; and it should be asserted in a special action on the case; and can be sustained only for nominal damages.

VIII. The claim of the Pahquioque Bank, (Record, p. 8, third clause; p. 10, last clause,) consists of two classes; the first for balance of account from 1st August, 1864, to 1st March, 1865, $7,475.65; the second, from 1st September, 1867, to 1st March, 1868, $49,920.19, to which interest is added, (Record, p. 4.) The bank, defendants in error, introduced checks and notes, indorsed by Judd, and relied thereupon as part of their evidence. The balance, $7,475.65, claimed under the first class, corresponds, in amount, with the balance due upon a note of Nathan Seeley and two notes of Fulton, (Record, p. 5.) The mutual

accounts between the banks, excluding the uncollected paper of Nathan Seeley, were adjusted and paid semi-monthly. (Finding of the Court, Record, close of p. 8.)

Upon the "Facts Found," it is submitted, that the defendants in error were not entitled to judgment upon either of these classes of claim. *First*, they were paid by means, satisfactory to the Pahquioque Bank, furnished by Nathan Seeley, the party bound to pay. *Second*, the notes and drafts of Fulton, the checks of Judd, were not returned; they were retained and used by the Pahquioque Bank, as its property.

A. The claim of the Pahquioque Bank, arising, exclusively, from the uncollected paper of Nathan Seeley, amounted, on the 28th of February, 1865, to $25,083.17, of which the sum of $7,283.74 was paid in some manner which does not appear, in relation to which there is no dispute, and no demand is made. The balance, being the sum of $17,799.33, was paid on the 28th of February, *by money belonging to Nathan Seeley*, the party bound to pay. This money was procured from a discount made by the Pahquioque Bank of four drafts, amounting to the sum of $18,000, drawn by I. T. Fulton on E. Robinson; by him accepted; subsequently indorsed by Nathan Seeley, and William A. Judd, Cashier. The Bank of Bethel had no ownership or interest in these drafts, its name does not appear upon the paper, no mark or envelope appeared, showing it had been in the possession of the Bank of Bethel. The Court say in its finding, "there was no agreement (express,) between the parties, that the Pahquioque Bank should receive the drafts as payment." The Court, after stating the balance of $25,083.17, say "to provide for the payment of which balance, the said Judd, as cashier of defendant bank, (the Bank of Bethel,) caused to be delivered to the Pahquioque Bank, four drafts drawn, etc.—that the net proceeds were credited to the account of Judd, Cashier." These acts, of the parties, intentionally and understandingly performed, constituted an agreement to receive the proceeds of the drafts in payment; from which the Pahquioque Bank cannot recede, whether Judd, as cashier, had, or had not, authority to bind the Bank of Bethel by his indorsement of drafts owned by Nathan Seeley and not by the bank. These drafts, at their maturity, were paid, in part, by the parties thereto, other than Judd, and, from time to time, renewed for the balance. New parties were obtained by the President of the Pahquioque Bank, who acted, in this respect, in behalf of the Pahquioque Bank, without the

previous request or knowledge of Judd. At the commencement of the suit there was due upon these renewals the sum of $8,900; which has since been diminished by the sum of $1,424.35, the amount received as dividends from the insolvent estates of Nathan and Isaac H. Seeley, leaving unpaid thereon the sum of $7,475.65, for which amount the Pahquioque Bank propose to rescind and vacate the payment made on 28th of February, 1865, and upon such rescission resort to their original claim for an equal amount; a course of proceeding which the law will not sanction. After the discount of the four drafts of Fulton, which were the property of Nathan Seeley, he had a right to call upon the Bank of Bethel for a surrender of his notes, checks and drafts, which had been sent to the bank for collection, equal in amount to the drafts, less the discount which had been received by the Pahquioque Bank.

United States v. *Rousmaniere*, 2 Mason, 373. "Where a bank in which the bonds for customs were left for collection under the authority of the Government, discounted for the principal obligor, certain notes for the payment of these bonds, and the proceeds were carried to the credit of the United States by the bank, in discharge of the bonds, and it turned out that the indorsements on the notes were forgeries practiced by the principal, it was held, that the bonds were discharged."

P. 376, *Mr. Justice Story.* "They, (the notes,) were discounted at the bank in the usual course of business, and the discount was received by the bank; and the most that can be said is that the proceeds were applied to the payment of the bonds. If the notes had been discounted at another bank, and the proceeds so applied, there would be no pretence to say, that the payment was not good and irrevocable. It cannot vary the case that the bank here was intrusted with the collection of the bonds. When it applied its own money to the discount of *Rousmaniere's* notes, the money became his, and as such was paid over to the United States; and it matters not how he obtained it."

The four drafts matured in April, 1865; the subsequent conduct of the officers of the Pahquioque Bank, in its use of the paper, shows that they considered the drafts as their own. They extended the time of payment by renewals, one of which, the note of Nathan Seeley for $7,000, did not become due until 17th of April, 1868; the President of the Pahquioque Bank made these renewals without the consent or knowledge of any director or officer of the Bank of Bethel, except Judd; the Pres-

ident of the Pahquioque Bank obtained new parties to the renewal notes, without the previous knowledge of Judd.

The Pahquioque Bank do not produce the drafts, having surrendered them at their maturity to some one or more of the parties thereto; if they had been received originally as conditional payment, for the amount thereof, less the discount, by this surrender the payment became absolute, and its character is not changed by the fact that Judd, as cashier, without the consent or knowledge of the directors of the Bank of Bethel, indorsed the renewal notes.

Harris v. *Johnston*, 3 Cranch, 311. An action cannot be sustained on an original contract for goods sold and delivered by a person who has received a note as conditional payment, and has passed away that note.

Alderson v. *Laughdale*, 3 Barn & Adol. 660. "The vendee of goods paid for them by a bill of exchange drawn by him on a third person, and after it had been accepted the vendor altered the time of payment mentioned in the bill, and thereby vitiated it; held that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold." *Lord Tenterden.* "It is perfectly clear that a bill of exchange will operate as a satisfaction of a precedent debt, if the holder makes it his own by laches—as by not presenting it for payment when due."

Douglass v. *Reynolds*, 7 Peters, 128. "He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto, at maturity, otherwise by his laches, the debt will be discharged."

B. On the 1st of October, 1867, the defendants in error claimed of Wm. A Judd, Cashier, a balance of $42,431.01, accruing from notes and checks of Nathan Seeley, sent for collection. *To provide for the reduction of this balance*, Judd, as Cashier of the Bank of Bethel, but without the knowledge or consent of the directors or any officer of the bank, drew five checks on said bank for $5,000 each, three dated October 4th, 1867, two bearing date of October 5th, 1867, all signed

by Judd, Cashier, payable to Wm. P. Seeley, Cashier (of the Pahquioque Bank,) or order, which checks, amounting to $25,000, *were credited to Wm. A. Judd, Cashier, reducing by said sum the aforesaid balance*, and charged to loan account to Wm. A. Judd, Cashier. On 31st December, 1867, another check for $10,000, signed and payable as the previous five checks had been, and in like manner credited to Judd, Cashier, *to reduce said balance*, and charged to loan account to Wm. A. Judd, Cashier. No agreement was made between the parties to receive said checks as payment other than such as may be implied from the facts found. (Record, pp. 10 and 11.)

The checks have not been paid, not presented for payment, are now held by the Pahquioque Bank, no return, or offer to return.

Upon these facts, which appear in the finding of the Court, the checks were drawn, delivered and received for the express purpose of *reducing the balance* of the apparent indebtment of the Bank of Bethel, to the Pahquioque Bank, as it stood upon the books of said bank, no entry of the balance or of the checks appearing upon the books of the Bank of Bethel. The amount of the checks was credited to Judd, and charged to loan account. This transaction was intended, in the language of the "Facts Found," to provide for the reduction of the balance, which was not accomplished unless the checks constituted payment. The officers of the Pahquioque Bank, were not, in any manner misled or deceived. They acted with their eyes open, and cannot resort to their original cause of action, if any such existed; and it is immaterial whether Judd bound the bank, or, for the want of authority, bound himself only.

At the time these checks were given, the banks were required by the law, as it then existed, to render their quarterly accounts to the Comptroller of the Currency. On the 1st Monday of October, 1867, (the 7th,) and on the 1st Monday of January, 1868, (the 6th.) This may have furnished the motive for a reduction of the large balance of the apparent indebtment of the Bank of Bethel.

The checks which were given for sums certain, were of a different character; were, as security, of a higher nature and grade than a claim against the bank, for uncertain or nominal damages arising from its supposed neglect to return, or give notice of the nonpayment of the notes and checks of Nathan Seeley who had no funds at the Bank or elsewhere with which to pay them.

IX. Although the notes, checks and drafts of Nathan Seeley, which were sent to the Bank of Bethel, for collection, were not protested or returned; The "Facts Found" show the acts, and course of dealing between the two cashiers, in connection, to some extent, with the President of the Pahquioque Bank, from which it is clear that the officers, for several years, at least, had knowledge, that the notes, checks and drafts of Nathan Seeley had not been paid.

X. William A. Judd, Cashier of the Bank of Bethel, was guilty of gross fraud and negligence, acting in collusion with Nathan Seeley, by which his uncollected paper constantly accumulated in the Bank, from the 1st of August, 1864, to 1st March, 1868; of which fraud, collusion and accumulation the officers of the Pahquioque Bank had knowledge, and by their conduct contributed thereto. (Error No. 16, supra, p. 5.)

Fraud or no fraud, a knowledge or want of knowledge thereof, are questions compounded of law and fact; in cases in which a special verdict has been rendered, or the "Facts Found" they are questions of law, which are to be determined therefrom.

A. "Facts Found," showing that the officers of the Pahquioque Bank, had knowledge of the fraud and collusion of Judd, of Nathan Seeley, and contributed thereto.

(1.) The officers of the Pahquioque Bank knew the amount of its capital, $250,000, and also that of the Bank of Bethel, $60,000; and that they were banking associations under the laws of the United States. (Record, p. 7.)

(2.) They knew that Nathan Seeley, during all the time the account in suit was accruing, was a depositor and customer, at the Pahquioque Bank, and often overdrew his account. (Record, p. 11, 2nd clause.)

(3.) They knew that all the accounts between the two banks, generally in favor of the Pahquioque Bank, excepting and excluding the uncollected notes, checks and drafts of Nathan Seeley, were adjusted semi-monthly by correspondence between the two cashiers, and the balances paid. (Record, p. 8, last clause.)

(4.) They knew that the notes, checks and drafts of Nathan Seeley, which had been sent to the Bank of Bethel for collection; which had not been returned, or paid by Judd, amounted, on the 28th of February, 1865, to the sum of $25,083.17, (Record, p. 9.)

(5.) They knew that they settled this balance, by receiving and discounting four drafts of Fulton, not owned or marked by the Bank of Bethel, the property of Nathan Seeley, to provide for the payment of such balance, which Seeley was bound to provide for and pay.

(6.) They knew that these four drafts at maturity, were paid, in part, by the parties therto, other than Judd; that they were renewed, from time to time, for the unpaid balance; that new parties were added to the paper, which new parties to the renewal paper were obtained by the President of the Pahquioque Bank, without the previous knowledge of Judd.

(7.) After this settlement on the 28th February, 1865, the Pahquioque Bank continued to send the notes, checks and drafts of Nathan Seeley, to Judd, Cashier, for collection, which were not included in the subsequent semi-monthly settlements, between the two cashiers.

(8.) They knew that in addition to the balance of $25,083.17, which was settled on the 28th of February, a balance of $42,431.01 had accumulated on the 1st of October, 1867, accruing from the notes and checks of Nathan Seeley, sent for collection. (Record, p. 11.)

(9.) They received on the 5th of October, 1867, to provide for the payment of said balance, five checks of Judd, Cashier, upon the Bank of Bethel, for $5,000 each, and on the 3rd of December, a like check for $10,000, all of which checks were payable to Wm. P. Seeley, Cashier, (of the Pahquioque Bank,) or order, and the amount thereof charged to loan account to Wm. A. Judd, Cashier, and credited to Judd, Cashier, reducing said balance of $42,431.01, by said sums, the amount of the six checks. (Record, p. 10, 2nd clause.)

(10.) After 1st October, and after December 31, 1867, the Pahquioque Bank continued to send the notes and checks of Nathan Seeley, to Judd, Cashier for collection as shown by the balance claimed, amounting to $49,920.19. (Record, p. 4.)

(11.) At the time Wm. P. Seeley, Cashier, received the four drafts, upon which Judd, Cashier, was the last indorser; and at the time he received the check of Judd, Cashier, upon the Bank of Bethel, he had never seen an indorsement by Judd, or his checks as cashier, upon the bank, of which he was cashier. (Record, p. 11, 1st clause.)

(12.) The officers of the Pahquioque Bank knew at the time the checks of Judd, Cashier, were received in October and December, 1867, to provide for a reduction of the balance of $42,431.01, that banking associations, were required on the 1st Monday of October 1867, and the 1st Monday of January, 1868, to make quarterly reports to the Comptroller of the Currency exhibiting in detail, and under appropriate heads, their resources and liabilities. (Act 3rd June, 1864, Ch. 106, Sec. 34.)

(13.) The officers of the Pahquioque Bank, although evidently solicitous for the welfare of the Bank of Bethel, did not give to its president or directors any notice, or intimation of the transactions disclosed by the "Facts Found."

(14.) The cashier of the (original) plaintiff bank, had given notice to the cashier of the (original) defendant bank, requesting the latter to protest all such notes and checks (of Nathan Seeley) as were not paid, and return them. (Record, p. 10, at close.) A fact which has a double aspect.

C. B. GOODRICH.
ROGER AVERILL.
LYMAN D. BREWSTER.

(15.) The five checks of Judd, Cashier, for $5,000 each, three dated October 4th, two October 5th, 1867, and his check for $10,000, dated 31st December, 1867, were not presented at or to the Bank of Bethel for payment; which fact, taken in connection with the fact that they were discounted by the Pahquioque Bank, and the amount thereof charged to loan account to Wm. A. Judd, Cashier, shows that they were received as a substitute for money, and under an agreement not to present them for an indefinite period of time.

...EME COURT

...

...UNITED STATES.

...Fahquioque Bank

...

...l Bank of Bethel.

...D ABSTRACT

...PLAINT IN ERROR.

SUPREME COURT

OF THE

UNITED STATES.

THE FIRST NATIONAL BANK OF BETHEL,

Plaintiff in Error,

vs.

THE NATIONAL PAHQUIOQUE BANK OF DANBURY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

On the 21st of February, 1868, the Bethel Bank failed to redeem some of its circulating notes, which were duly protested, and on the 26th of February a receiver was duly appointed under the 50th section of the currency act, who immediately entered on the duties of his office.

The Pahquioque Bank claimed to be a creditor of the Bethel Bank; due presentment was made of the claim to the receiver and it was by him disallowed.

Upon examining the currency act it was found that no special court or board was organized to adjudicate upon disputed claims against

institutions in the hands of a receiver. The Pahquioque Bank therefore adopted the common law remedy by an action at law against the Bethel Bank, inviting thereby the strictest and fullest scrutiny of a judicial tribunal into the fairness and justness of the demand. The suit was brought against the Bethel Bank, as it needs must be, but service of process was made upon the receiver as being at that time the representative of the Bank.

The parties consented to join the issue to the Court instead of jury, and the matters in issue were carefully and impartially examined by a learned judge of the Superior Court of the State. He made a full finding of the facts and reserved the case for the advice of the Supreme Court. The Supreme Court unanimously advised the Superior Court to find the issue for the plaintiff for the full amount of its claim. In pursuance of this advice the Superior Court so found and rendered judgment for the plaintiff, then the Bethel Bank, by motion in error, bring the case again before the Supreme Court of the State, and the judgment of the Superior Court is affirmed. To review this final judgment of the Supreme Court the writ of error is brought now pending in this Court. The case was thus twice before the Supreme Court of Connecticut, first, by way of reservation for advice, which is an informal proceeding, and which is not made matter of record, and secondly, by way of writ or motion in error, which is matter of record, and in which proceeding a final judgment is rendered.

At a future stage in the argument we may have occasion to carefully examine the record and to ascertain from it what precise rulings on legal points were made by the Court, and what questions fairly arise for discussion here.

But we first ask attention to rulings which we admit were made by the State Court, and which we admit it is our duty here to vindicate.

And first, the Bank of Bethel claimed exemption from being sued by virtue of certain clauses in the currency

act, and having so claimed it has an undoubted right to review by writ of error in this Court the adjudication of the State Court adverse to the claim of exemption.

I propose then to examine (1) whether the Pahquioque Bank can maintain *in any Court* an action at law to establish the justice of the claim which the receiver disallowed.

The counsel for the Bethel Bank argued at the trial in Connecticut that the disallowance and rejection by the receiver of the claim presented to him was a decisive adjudication of that claim.

This point was much elaborated by the counsel for the Bethel Bank, and an adverse decision upon it is assigned as the second error in the assignment of errors in the record.

We supposed on our part that the proposition carried its refutation on its face, but our respect for the counsel from whom the proposition emanates, requires us to state briefly the reasons why we think that Congress has not vested in the comptroller or receiver, or both of them, this extraordinary power of adjudicating upon and finally settling the rights of creditors, or of those who claim to be creditors, of the insolvent Bank.

1. The comptroller and receiver are not judicial officers. They cannot hold a Court, summon a jury, compel the appearance of witnesses, or swear witnesses if they should appear.

The Constitution of the United States vests the judicial power in Courts, and provides that the judges both of the Supreme and inferior Courts shall hold their office during good behavior. The comptroller and receiver hold their offices by no such tenure, and are therefore not judges of any Court.

2. Every citizen of the republic may of common right appeal to a judicial tribunal for the adjudication of his rights.

3. The right of trial by jury is secured by the constitution to controversies of the character of that between these two banks, and the right of trial by jury implies that the controversy may be brought before a court that has power to summon a jury.

4. There is nothing in the statute which can fairly be construed as intending to confer judicial power upon the comptroller or receiver.

There is in the act no provision for the establishment of a special tribunal to adjudicate claims against the insolvent bank. In the State laws such special tribunals are common in cases of insolvent deceased persons, and of insolvent assigning debtors, and of insolvent corporations in the hands of receivers. Such special tribunals, usually called commissions, are Courts with judicial powers, but the right of appeal is always given to the regular and established tribunals of the State, and such right of appeal is made necessary by the constitution itself of the State of Connecticut.

Whether Congress could consistently with the Constitution establish such a special tribunal may be doubtful. I am not aware that it has ever done so. Under the bankrupt act the registrar takes proof of debts, but the adjudication of them in cases of contest is by the District or Circuit Courts.

5. The failure in the currency act to make any special provision for the adjudication of contested claims, leaves their adjudication to the courts in the ordinary course and manner of settling disputed claims. This would be the necessary inference from mere silence, and is confirmed and established by the provision in the 50th section, that the comptroller is to make a rateable dividend "on all such claims as may have been proved to his satisfaction or *adjudicated in a court of competent jurisdiction.*" And again, further dividends are to be made "on all claims previously proved *or adjudicated.*"

These clauses clearly imply that there may be an adjudication in Courts of competent jurisdiction. What these Courts are in which jurisdiction may be exercised will be the subject of inquiry by and bye; our present proposition is, that there may be an appeal to *the Courts* and that the receiver's rejection of our claim is not conclusive and final. If the receiver's decision was final, no claims could receive a dividend except such as were allowed by him, but the currency act provides that claims *adjudicated by a Court of competent jurisdiction* shall be entitled to a dividend as well as those approved by the receiver, and whether approved by him or not; and the act is clear in saying what is to be the subject of adjudication by the Court, to wit: *the claim of a party to be a creditor and as such entitled to receive a dividend.*

We say then that we may submit our claim to judicial decision (1) by *magna charta* and common right, (2,) by express provision of the constitution of the United States, (3,) by necessary inference from the fact that no special tribunal is organized by the currency act, and (4,) by the express provisions of the currency act itself.

It is said by the counsel for the Bethel Bank, in the next place, that whatever other appeal to the courts we may make, we cannot sue the Bethel Bank, because they say *that corporation had ceased to exist at the time our suit was instituted.*

That the corporation once had a being is admitted and found by the Court. It is also clear that the twenty years of life allotted to it by act of Congress has not expired. When then and how has it become extinct so that it cannot be made to respond as party defendant in Court?

It is provided in the 8th section of the currency act "that associations formed under it shall have succession by the name designated in its organization certificate, for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act."

Now it is the Bethel Bank that undertakes to screen itself from liability to suit by saying (1) that it has been guilty of a violation of the act of Congress, and (2) that thereby its franchise is forfeited, and (3) that by consequence it cannot now be reached by human laws.

We reply, that the Bethel Bank in so saying mistakes both fact and law. It is indeed true, as found in the record, that the bank on the 21st of February, 1868, "failed to redeem some of its circulating notes which were duly presented for payment, and thereupon appropriate proceedings were had which resulted in the appointment on the 26th of February of Mr. Tweedy as receiver, &c."

Such a failure to redeem may have been the result of fire, robbery, misplaced confidence in agents, failure of debtors, and a thousand accidents whereby the bank may have become unable to meet its obligations. Such a failure may be and probably was a misfortune, but it was not necessarily, nor is it found to be *a violation of the act.* Such a failure entails upon the bank precisely the consequences which are specified in the act and no other consequences.

These consequences are 1st such as are specified in §46: "After such default, on examination of the facts by the comptroller and notice by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it and to deliver special deposits,"

It is obvious from this section that the default of the bank in failing to redeem its circulating notes, curtails some of its powers and nothing more. If the bank ceased to exist as the consequence of the

default, there would be no occasion to say that it should not discount paper. The specification of certain disabilities as the result of the default, implies that the bank continues to exist and to have whatever powers are not thus specifically taken from it.

Further consequences of the failure to redeem are specified in §50, to wit: "The appointment of a receiver who shall *take possession* of the books, records and assets of every description of the association, collect all debts, dues and claims *belonging to* the association, sell or compound bad or doubtful debts, sell all the real and personal property of such association, &c."

Now it will be noticed (1) that throughout this section the association is spoken of as existing, not as defunct (2;) that the receiver is invested merely with a power over the assets, and that the assets are not transferred to him or vested in him, and by consequence the title remains in the bank until the power of sale is exercised. It may become necessary for the receiver to institute suits in order to collect the debts or recover the assets of the Bank. Must not such suits be in the name of the bank?

It is enough, however, for the purposes of the present argument to say that the 50th section does not by any of its provisions deprive the bank of its corporate existence, and if not, by necessary implication that existence continues.

But if the counsel for the Bethel Bank are right in claiming that their client did violate the act, *such violation does not per se and ipso facto destroy the life of the corporation.*

By the undoubted rules of the common law and by the express provisions of the §59 of the currency act, a judgment of forfeiture by a judicial tribunal is necessary, and the corporate existence continues till such judgment is had. Questions of forfeiture cannot be tried in a collateral way. The only evidence which the law admits is the copy of the judgment of forfeiture by a competent tribunal in a proceeding instituted directly for the purpose of an adjudication of forfeiture.

The existence of the Bethel Bank is recognized by all the proceedings relating to this writ of error. That bank as a corporate body is plaintiff in error, and enters into a recognizance as principal with Messrs. Averill & Booth as sureties for the prosecution of the writ.

The Bethel Bank then, at the time our suit was brought, was in existence, and the proper subject of a suit against it in a proper court.

But the plaintiff in error says in his first assignment of errors *that the State courts have no jurisdiction of the suit.*

Section 57 of the currency act provides that suits, actions and proceedings against any association under this act may be had in any circuit district or territorial court of the United States, held within the district in which such association may be established, *or in any state, county, or municipal Court in the county or city in which said association is located having jurisdiction in similar cases.*

Under this section it seems difficult to doubt the jurisdiction of the state Court, and without the section the state Courts necessarily have incidental jurisdiction over all persons and corporations within the limits of the state, unless expressly restrained by special provisions to the contrary.

The 3d and 4th assignments in error complain that the receiver was not *made a party to the suit.*

This objection, if otherwise well founded, comes too late. The nonjoinder of necessary parties is (1) mere matter of abatement. (2) In the ample inventory of objections to our action contained in the notice filed by the defendant in the Superior Court, no such objection is taken. (3) No such objection appears on the record in any manner until it is suggested by way of assignment in error after judg-

ment rendered. The failure to make the receiver a party to the suit if it be a fault is *waived* by not taking the objection at a proper time.

But the receiver could not be made a party defendant. The currency act does not make him debtor. It is true that the receiver became by virtue of the currency act the proper representative of the bank in the same sense in which the president and directors had before been its representative, and for this reason, service of the process in this case was made upon the receiver, in pursuance of the practice of the Courts of Connecticut in similar cases; and so this Bethel Bank, "incapable of self defence" has had "the legal protection and guardianship" of the receiver in the only way it could be done, not by making the receiver a party defendant, but by serving the process upon him as the appropriate representative of the bank. Under this guardianship the case was defended in the state Courts, and by the same guardian care it is in this, the highest tribunal of the nation.

The questions thus far discussed arise under the 1, 2, 3, 4, and 18th assignment of errors by the plaintiff in error. These questions are all governed by the laws of the United States, and particularly by the currency act. If the state Court has erred in its construction of that act, the judgment complained of must of course be reversed.

But if the state Court properly decided these questions, and if under the currency act the Bethel Bank was amenable to the common law jurisdiction of the Court, the only remaining question in the case is whether the Bethel Bank was indebted to the Pahquioque Bank in the manner alleged in the plaintiff's declaration.

That question of indebtedness depended in no manner upon the laws of the United States. It was to be decided simply upon the common law. The contracts out of which the indebtedness arose, were made in Connecticut to be performed there, and were to be construed by Connecticut laws. The only points upon which the laws of the United States *could* by possibility be drawn in question, are those relating to

The existence of the Bethel Bank is recognized by all the proceedings relating to this writ of error. That bank as a corporate body is plaintiff in error, and enters into a recognizance as principal with Messrs. Averill & Booth as sureties for the prosecution of the writ.

The Bethel Bank then, at the time our suit was brought, was in existence, and the proper subject of a suit against it in a proper court.

But the plaintiff in error says in his first assignment of errors *that the State courts have no jurisdiction of the suit.*

Section 57 of the currency act provides that suits, actions and proceedings against any association under this act may be had in any circuit district or territorial court of the United States, held within the district in which such association may be established, *or in any state, county, or municipal Court in the county or city in which said association is located having jurisdiction in similar cases.*

Under this section it seems difficult to doubt the jurisdiction of the state Court, and without the section the state Courts necessarily have incidental jurisdiction over all persons and corporations within the limits of the state, unless expressly restrained by special provisions to the contrary.

The 3d and 4th assignments in error complain that the receiver was not *made a party to the suit.*

This objection, if otherwise well founded, comes too late. The nonjoinder of necessary parties is (1) mere matter of abatement. (2) In the ample inventory of objections to our action contained in the notice filed by the defendant in the Superior Court, no such objection is taken. (3) No such objection appears on the record in any manner until it is suggested by way of assignment in error after judg-

ment rendered. The failure to make the receiver a party to the suit if it be a fault is *waived* by not taking the objection at a proper time.

But the receiver could not be made a party defendant. The currency act does not make him debtor. It is true that the receiver became by virtue of the currency act the proper representative of the bank in the same sense in which the president and directors had before been its representative, and for this reason, service of the process in this case was made upon the receiver, in pursuance of the practice of the Courts of Connecticut in similar cases; and so this Bethel Bank, "incapable of self defence" has had "the legal protection and guardianship" of the receiver in the only way it could be done, not by making the receiver a party defendant, but by serving the process upon him as the appropriate representative of the bank. Under this guardianship the case was defended in the state Courts, and by the same guardian care it is in this, the highest tribunal of the nation.

The questions thus far discussed arise under the 1, 2, 3, 4, and 18th assignment of errors by the plaintiff in error. These questions are all governed by the laws of the United States, and particularly by the currency act. If the state Court has erred in its construction of that act, the judgment complained of must of course be reversed.

But if the state Court properly decided these questions, and if under the currency act the Bethel Bank was amenable to the common law jurisdiction of the Court, the only remaining question in the case is whether the Bethel Bank was indebted to the Pahquioque Bank in the manner alleged in the plaintiff's declaration.

That question of indebtedness depended in no manner upon the laws of the United States. It was to be decided simply upon the common law. The contracts out of which the indebtedness arose, were made in Connecticut to be performed there, and were to be construed by Connecticut laws. The only points upon which the laws of the United States *could* by possibility be drawn in question, are those relating to

trial. The record states "the items of the plaintiff's bill of particulars *which are disputed by the defendant*, consist of the checks and notes of one Nathan Seeley."

In regard to all the paper charged in our account, except only the paper of Nathan Seeley, there is no complaint in regard to the original items, but that the defendant bank received the amount which the paper called for, and had the full benefit of it. The balance of these original items and dealings, including the notes and checks of Nathan Seeley, is found in the record to be in favor of the plaintiff to the amount of $58,325 50, with interest from March 1, 1868.

This balance, it will be noticed, is the precise balance claimed by our bill of particulars. The judge finds our account, as represented in the bill of particulars, to be correct *de facto*, but whether correct *de jure*, and such that we are entitled to recover the balance, depends upon certain questions of law specially reserved by the judge for the advice of the Supreme Court of Errors of the State.

These questions specially reserved are stated in the record as follows: "But if the court, (i. e. the Court of Errors,) shall be of opinion that the drafts or checks aforesaid constitute in law payment *pro tanto* of said account, or if the amount represented by the notes and checks of Nathan Seeley *not collected by the defendant as aforesaid*, cannot be recovered *in this action*, then I find the account between the parties as the balance will be after deducting from the plaintiff's account as above found, such sum or sums, with the interest thereon, as cannot, in the opinion of the Court, be properly included in said account or recovered in this action; and if such sum or sums so rejected, shall in the aggregate exceed in amount the balance of the plaintiff's account as first found above, then I find nothing due from the defendants to the plaintiffs, but a balance due from the plaintiffs to the defendants equal to the amount of such excess.

The question whether this case ought to be dismissed for want of jurisdiction, and if not, what judgment ought to be rendered in the case, is hereby reserved for the opinion and advice, &c."

Of the three questions thus above specially reserved I have already discussed that of jurisdiction. I will now turn attention to the question relating to that part of the plaintiff's account which charges the defendant *with notes and checks of Nathan Seeley, sent to defendant for collection.* The facts in regard to this question are as stated in the abstract from the record herewith printed, and the bare recital of the facts sufficiently shows the validity of the plaintiff's claim.

For greater distinctness we will consider: 1st. Nathan Seeley's *checks* upon defendant bank, "they are received by the plaintiff bank for collection, and unless protested or notice given to the plaintiff of non-payment were charged to the defendant. The cashier of the plaintiff bank had given notice to the cashier of the defendant bank, requesting the latter to protest all such notes and checks, as were not paid, and return them, but a large amount of the notes and checks of Nathan Seeley so sent were never collected by the defendant and never paid by said Seeley, and said Seeley had no funds in the defendant's hands or elsewhere from which they could be paid or collected, but said notes or checks were never at any time protested for non-payment or returned to the plaintiff, nor was the plaintiff in any way notified of the fact of non-payment unless such notice can be inferred from the facts herein found—the said notes and checks of said Seeley which were not paid, were not entered in any way on the books of the defendant bank, and no officer of the defendant bank other than said Judd, had any knowledge of the existence of any such checks or notes, or that the plaintiff bank had charged to the defendant such notes and checks. The directors of the defendant bank were never consulted and never took any action or made any inquiry as to the mode of providing for the payment of any balance due to the plaintiff bank, or how such account stood between the parties, but said cashier was the only officer of the defendant bank who attended in any way to this branch of the business."

The finding states that these checks were sent "for collection." Being checks upon the bank to which they were thus sent, the collection was to be from itself, and in substance, therefore, the sending is "for payment;" not however that payment should be remitted for each check. "The parties had mutual accounts, and the balance was struck usually on the beginning and in the middle of each month, and the accounts then adjusted between the cashiers by correspondence and the transmission of checks and drafts sufficient to balance." These checks were then sent for payment and to pass into the mutual accounts to the credit of the party sending them, and to be paid on the succeeding semi-monthly day of settlement.

Our claim is, that by the familiar rules of the law-merchant the retention by the defendant bank of these checks, without notice of dishonor, is an acceptance of them, and that the plaintiff bank became entitled to charge them on account, as soon as a reasonable time had elapsed for their protest and return.

Both banks acted upon this as the rule, the plaintiff bank "paid the parties from whom they received these checks, the full amount thereof." What else besides thus pay could they do? They had received the checks for collection. The parties from whom they were received were entitled to payment or a return of the checks. The retention of the checks by the defendant bank made it impossible for us to return them, and therefore we were compelled to pay and did pay. The defendant bank treated the checks as good, they were charged in our account, and the balances struck semi-monthly, embracing them with the other items of the account. These balances were adjusted between the cashiers by correspondence, and admitted by the cashier of defendant bank to be correct.

Now if the defendant were a natural and not an artificial person, and had in his own person thus received the checks and given credit to them, no question could possibly be made against our account.

But it was objected in the state Court that the defendant is a corporation, and in all these transactions their cashier exceeded his powers, and that the plaintiff bank dealt with the cashier alone, having no communications with directors, and the directors being in entire ignorance of all these transactions between the two banks, and that the cashier had no authority to accept or pay checks, or treat them as good, unless he had funds wherewith to meet them, and that the cashier had no authority to adjust the accounts, and strike the balance, and bind the defendant bank by his admission of the correctness of the account, which included charges of these Nathan Seeley checks.

It was further objected, that the checks and notes were sent by the plaintiff "to the said Judd, as cashier of the defendant bank," and the finding is in this language, and is in the same language in regard *to all* the notes, drafts, and checks charged in our bill of particulars. The practice it seems was uniform, in respect not only to Nathan Seeley's paper, but to all paper, and extended back to the commencement of the account.

It is submitted that such is the practice among all banks. The usual form of a bank check is "to the cashier;" such is the form given in Parsons on Bills. It is certainly proper to send the check to the official to whom it is addressed. Letters to the cashier are on the face of them official, and belong to the corporation, and are subject to its control and order.

The checks then being properly sent, we were entitled to have them accepted and paid, or returned, and the failure and neglect is the failure and neglect of the bank, and chargeable upon the bank. If their cashier neglects his duty, the responsibility and loss occasioned by the neglect must rest upon the defendant who employed him, not upon the plaintiff who dealt with him as the accredited agent of the defendant bank.

The defendant being a corporation can act only through agents. Some agent of the corporation must conduct its correspondence, receive its checks, adjust its accounts. We dealt with "the only officer of the defendant bank who attended in any way to this branch of the business. Judd was the accredited agent of the bank to receive, accept and pay checks, and his acts accepting a check bind the bank, *whether the drawer has or has not funds to meet the check*, the act is within the apparent scope of his authority, and if loss occurs it should fall on those who employ him and give him credit, and who may by proper bonds secure themselves against his unfaithfulness, rather than upon the innocent holders of the checks.

The finding states that these notes and checks were not entered on the books of the defendant bank, and that no director or officer of the defendant bank other than the cashier had knowledge of the existence of such checks or notes, or that the plaintiff bank had charged the defendant bank such notes and checks. This failure of knowledge was the result of concealment and neglect on the part of the defendant's cashier, or of negligence on the part of the directors themselves. It was certainly no fault of ours. It would be unusual and impertinent to address communications on the subject to the president and directors, especially where, as in this case, the entire charge seems to have been committed to the cashier. Where the president and directors of the defendant bank place such unlimited confidence in the cashier. might not we follow their example? We had no cause to know, or reason to suspect, either unfaithfulness of cashier or negligence of directors of defendant bank.

But besides checks, Nathan Seeley's notes payable at the defendant bank were sent for collection, and not being returned or protested, were treated as paid, and were by the plaintiff bank charged in account to the defendant bank. None of these notes were discounted by

the plaintiff bank, and they had no other interest in them than that they were the channels through which the notes were sent. Nathan Seeley lived in Bethel, and had his place of business there, and he made notes payable to the bank there. Parties and banks owning these notes it seems, sent them frequently to the plaintiff bank for collection instead of sending them directly to the defendant bank.

The plaintiff bank recognizing the familiar rule of the mercantile law treated these notes as paid if not protested and returned at their maturity, and promptly paid their correspondents the full amount. The cashier of the defendant bank also recognizing the same familiar rule, from time to time adjusted the accounts between the banks, admitting the charge of these notes.

The notes and checks are treated in the finding as standing on the same common ground, and the rules of law are similar but not identical.

The practice of banks to act as collecting agents for each other, is nearly universal, their mutual convenience requires it. Most business paper in this country is made payable at some bank where the maker does his bank business, the payee usually gets it discounted at the bank where his business is done, the discounting bank sends it for collection to the bank where it is payable, either directly or through some other bank, and such mutual dealings become not only convenient but necessary and often very profitable to the banks. Such dealings, to a large amount, existed between these banks as appears by the bill of particulars.

Now these collections are always conducted by the cashiers and their subordinates. No action of the Directors is called for or taken. The business is of the simplest possible kind. If the note is paid it is credited to the bank sending it. If not paid, is is protested and returned. The cashier and book keeper are the sole representatives of banks in regard to these collections. If the note is not protested and returned it is treated as paid. If the bank holding the note chooses to trust the maker and not protest and return it, the note thereby becomes the property of the collecting agent who takes all the risk of

its being eventually paid. Now it may be true that the cashier neglects or violates his duty to his employers who keeps a collection note without having funds of the maker in bank to meet it. He neglects his duty if he fails to have the note protested and returned. But who shall suffer for the neglect? Those who employ an unfaithful cashier and give him show of authority, or those who deal with the corporation confiding in its appropriate representative.

It was objected that we could not recover *in this action.* That even if right in the points thus far made, our action must be *special*, charging neglect in the failure to notify and return. And it will be noticed that this point is reserved by the Superior Court for the advice of the Supreme Court of the State, whether the plaintiff can recover in this action; and the ruling of the Court upon it is complained of in the assignment of errors. In reply to this objection, we say that though the defendant bank did not actually receive payment, yet by its failure to notify us, it gave us the right to treat the paper as paid and charge it accordingly. We may, therefore, recover as for money had and received by the defendant, or for money paid for its use. We may also, if needed, resort to the count on an account stated. The finding says, "these semi-monthly balances were usually in favor of the plaintiff bank, and were as represented on the bill of particulars, and were from time to time admitted by said cashier of the defendant bank to be correct." These admissions are acts appropriate to the duty of the cashier and binding on defendant bank. The form of the action seems therefore free from objection under any law, and certainly is free from objection in Connecticut; and the form of action would seem to be matter wholly and exclusively of State cognizance.

These unpaid notes and checks of Nathan Seeley, though not entered on the books of the defendant bank, were it seems preserved among its assets, and just before the taking possession of the bank by the receiver, the cashier took Nathan Seeley's note for them indorsed by Isaac Seeley, and from this note dividends have been received from the insolvent estates of these parties. These facts are significant as showing how fully the cashier of the defendant bank by his acts re-

cognized the truth that the Nathan Seeley notes and checks had by neglect to protest and return them to the plaintiff become the property of the defendant.

In taking these notes and securities Judd acted as cashier of the defendant bank, and though he acted without the knowledge of the other Directors they have never repudiated the act, and the receiver who now represents the bank although he *presented* the note against the Insolvent Estates of the maker and indorser, "for the benefit of whom it should concern," yet "on said note as receiver of the defendant bank he has since the commencement of this suit *received* dividends." The defendant still retains this note as part of the assets of the Bethel Bank, and if by any turn in the wheel of fortune, Nathan Seeley or Isaac H. Seeley should become able to pay their debts, the Bethel Bank (as their creditors, owners of the paper in dispute and of the notes which their cashier took of them) would have, and alone would have, a valuable and collectible debt against the Seeleys arising from the notes and checks now under consideration.

The principal authorities upon the subject thus far discussed will be found: Angel and Ames on corporations, 250—251; 8 Metcalf R., 79; Phipps *vs.* Milbury Bank, 23 Pickering, 33; Folers *vs.* Mercantile Bank, 6 Metcalf R., 13; Bank of Baltimore *vs.* Bank of Boston, 17 Mass., 511; 10 Foster, 256; 10 N. H. R., 505; Jaffrey *vs.* Cornish, 15 Conn. R.; Stamford Bank *vs.* Benedict, 1 Peters, 25.

The remaining question reserved for advice, viz.: whether certain drafts or checks constitute in law payment *pro tanto* of the amount, divides itself into two questions distinct from each other, as to the facts on which they depend.

And first the facts relating to the drafts of I. T. Fulton on E. Robinson appear as in copy of record in abstract herewith printed.

This item of $7,475 65 is part of the sum recovered by us, and whether properly included in the judgment or not depends upon the question of law reserved. This question connects itself with no other

question in the case. It is found that on the 28th of February, 1865, there was due to the plaintiff bank a balance of $25,083 17, of which balance $7,475 65 is now left due "unless the drafts of Fulton in contemplation of law constituted payment of the original amount." Now this transaction occurred in Connecticut and took place in February, 1865, before the Hatter's Bank had become the First National Bank of Bethel. In Connecticut, unproductive negotiable paper received upon an antecedent debt is not in law regarded as payment of the debt unless expressly agreed to be so taken, and the record finds there was no such agreement.

The plaintiff in error says these drafts were not owned by the defendant bank, and that its name does not appear on the paper, but we received the drafts from Judd as cashier, in regular course of business, and gave the Hatter's bank credit for the net proceeds. If there was any irregularity in Judd's action we knew nothing of it. The question is whether our admitted debt against the Hatter's Bank for the balance of $25,083 17 is extinguished and merged by these drafts. If Judd was not the authorized agent of his bank in giving us the drafts, and if the defendant repudiates his acts as being unauthorized, then surely we have received nothing which ought to extinguish the debt. But the defendant bank does adopt these acts of Judd and profits by them to the extent of over $10,000, which have been collected on these acceptances and applied towards the payment of the account.

The judge in his finding uses the expression that the net proceeds of the drafts amounted to $17,779 33. He does not mean that this whole amount was realized by the plaintiff bank from the drafts, for the contrary expressly appears. By net proceeds as here used is indicated merely the value of the drafts at their face, deducting interest and exchange. The sum of $17,779 33, expressing this value was credited to the defendant on the plaintiff's books, at the time, and we agree that such credit is some evidence of an agreement that the drafts should be received as payment.

But on the whole evidence in the case the court finds the facts to

be that they were not received as payment, and the continued endorsement of the successive renewals of the paper by Judd as cashier shows clearly that the plaintiff had never relinquished its claim upon the defendant bank for the balance represented by those acceptances; whether these indorsements as such do or do not bind the defendant bank is of no moment, they certainly furnish evidence of the continued existence of the plaintiff's rights against the defendant bank for the balance represented by the paper so endorsed, and of the understanding of both parties that the plaintiff's claim is not paid or satisfied or intended to be regarded as paid until the acceptances should be paid. On the case as found these acceptances were securities for the original debt, and there is nothing in the treatment of these securities by which the plaintiffs have lost their original debt.

No act of the plaintiff in respect to this paper has injured the defendant. It has been renewed with additional security obtained by the President of plaintiff bank at his own suggestion without consulting Judd. The president of the plaintiff bank desired to make these securities available first for the interest of the plaintiff bank, and second for the benefit of the defendant bank. Why should Judd *previously* know about it? The president of the plaintiff bank had a right to suppose that Judd, as cashier, would cheerfully consent to additional security thus obtained for the benefit of all parties.

But it is found that the plaintiff bank never communicated, &c. It is difficult to see why such communication should be expected. Mr. Judd was the cashier of the defendant bank, the plainitff's communications were to him as the proper representative of the defendant bank in such matters. The communications to and from a bank are usually through their cashier, even in respect to matters where the cashier has not full power, but must consult the directors. Third persons communicate with the directors through the cashier. The discounts of paper by a bank is regarded as peculiarly within the proviuce of the directors, but persons who offer paper for discount always send or hand it to the cashier and receive answer from him, and if the discount is made, receive the proceeds from him or from his subordinates, the teller or clerks.

The Board of Directors as such is to the public an invisible body, sitting with closed doors, acting by formal votes and majorities. The bank is not known to the public through the directors, but only through its cashier. He is the organ of communication with the external world; notice to him is notice to the bank. Communications to him are communications to the bank in respect especially to matters of cash, and accounts, and collections, and dealings with other banks.

But it is said the plaintiff has never delivered or offered to deliver or return to the defendant bank any of these drafts.

Why should we return them until and unless our debt is paid? The drafts were delivered to us by Judd, as cashier, "to provide for the payment" of a certain balance, and as security for such payment. No obligation arises to return the drafts. The plaintiffs still hope to make them available. If the defendant bank wants the drafts they must pay the amount for which they are held as security. Then perhaps they may have them, for they were received by the plaintiff from the defendant's cashier for the benefit of the defendant bank, although it seems in fact the defendant bank never discounted nor owned the drafts, nor does the name of the defendant appear on them except as "Wm. A. Judd, Cashier," without saying cashier o fwha bank.

The rules of law in respect to the notes and checks of third person operating as payment of a precedent debt, and the cases on the subject, are fully given in 2 Parsons on notes and bills, page 150—164, chapter 7, section 1, and there is no occasion to recite the cases here. The rule in all the States, except Massachusetts and Maine, is, that such notes and checks are *prima facie* collateral security, not payment, and not payment except by virtue of an express agreement.

The facts regarding the second branch of the question reserved, whether certain drafts and checks constitute in law payment *pro tanto* of the account, appear of record as per abstract of record herewith printed.

The only point of law presented to the Court upon these checks is, do they in law constitute payment *pro tanto*; and it is expressly found that no agreement was made between the parties to receive these checks as payment other than such as may be implied from the facts herein found.

How is the check of the cashier on his own bank, payment of a debt due his bank, unless expressly agreed to be so received? Will the law imply such agreement? From what facts? First, suppose Judd had full authority to bind his bank by their checks, then checks drawn by the bank on itself are in legal construction promissory notes of the bank payable to Seeley or order on demand. The plaintiff bank credits these checks on its general running account, and transfers the notes to loan account, so that on the plaintiff's books the Bethel bank is now debtor to loan account, instead of being debtor in general ledger account, Is this transfer of the account from one form to the other, payment? or is the receiving of the check payment in the absence of any agreement to that effect? The only legal effect of the transaction is, that the plaintiff bank now holds a check as security for part of the balance of its general account. Such a check is merely an acknowledgment of indebtedness—evidence of debt—an account stated. It operates in no manner to extinguish the book account, nor to qualify its nature; is no merger, nor novation; and being a check on demand, no extension of credit.

That such a check is in legal effect a promissory note. Miller *vs.* Thompson, 3 Man and G. 576; 1 Man. and R. 120 Roach and Ostler; 1 Parsons note and bills, 288. Being payable on demand, the bringing of the suit is sufficient demand. Burnham *vs.* Allen, 1 Gray, 596; 15 N Y. R. 337, Fairchild *vs.* R. R. Co.

No place of payment is specified in the check, and though these checks were not demanded of the defendant bank at its counter, the entire claim of the plaintiff, including these checks, was presented to the receiver before this suit was brought, and after the receiver had taken possession of the defendant bank and all its assets.

If a demand at the counter of defendant bank was ever necessary, surely when the bank is broken up and its place of business abandoned to a receiver, the mere form of presentment at the counter becomes unnecessary.

But these checks of Judd are unauthorized and void, and being so, they surely do not pay our account nor any part of it, nor in any manner affect our rights in relation to the account.

We have thus far conceded, for the sake of the argument, that the whole merits of the case were before this court for its adjudication upon questions of fact and inferences from facts, as well as upon pure questions of law. But the record in truth presents only a limited number of questions and they purely legal.

On examining the record, it appears that judgment was rendered in the Superior Court upon a finding of the issue in favor of the plaintiff; that issue was joined upon the denial by the defendant of the truth of the matters contained in the platntiff's declaration, the allegations in the declaration are therefore found to be true in fact, and will, I suppose, be treated as true by this court, unless there is something clearly inconsistent with them in the special finding. The judgment which was rendered by the Superior Court is therefore correct, unless the record shows that some rulings of law were wrongly made in the progress of the trial, and these rulings of law must distinctly appear, and the questions must appear to have been called to the attention of the Court at the trial.

This being so, the record presents the following questions and no others:—

1st. The question of jurisdiction.

2d. Is the plaintiff's action of general *indebitatus assumpsit* on the common counts adapted to the case?

3d. Is the fact that the Nathan Seeley notes were not in fact collected from him by the Bethel Bank, or paid to the bank by him, a sufficient legal answer to our action upon the facts found of failure to protest and return the notes, or give notice of non payment?

4th. Do the drafts of Fulton and the checks of Judd constitute in law payment *pro tanto* of the account?

5th. The record states that "all the matters of defence set up in the plea and notice were in issue in the same manner and to the same extent that they would have been if set up and stated in a special plea or pleas at common law, the facts set up in said notice being found true in so far forth as the finding of the court herewith annexed and made part of this record finds them to be true."

The only special facts set up in the notice by way of defence are, 1st, the facts affecting the jurisdiction, and 2d, the notice avers that the claim or pretended indebtedness of said National Bank of Bethel to the said Pahquioque Bank, arose out of transactions that were and are irregular, illegitimate, illegal, fraudulent, and void, &c."

The general issue being found for the plaintiff, these averments of the notice are found untrue, except so far as they may be found true in the special finding. If the special finding discloses that which is illegal, fraudulent and void in the transactions of the plaintiff bank, then whatever questions of law may arise out of such transactions appear upon the record. But the special finding in truth discloses no fraud.

These seem to us to be the only questions which legally appear on the record, and in regard to all of them except that relating to jurisdiction, they are governed by the law of the State of Connecticut, and not by any laws of Congress, and we cheerfully submit that there is no error in the judgment complained of.

4

Submitted by
O. S. Seymour
W. T. Taylor
M. W. Seymour
Counsel for
Defendants

If a demand at the counter of defendant bank was ever necessary, surely when the bank is broken up and its place of business abandoned to a receiver, the mere form of presentment at the counter becomes unnecessary.

But these checks of Judd are unauthorized and void, and being so, they surely do not pay our account nor any part of it, nor in any manner affect our rights in relation to the account.

We have thus far conceded, for the sake of the argument, that the whole merits of the case were before this court for its adjudication upon questions of fact and inferences from facts, as well as upon pure questions of law. But the record in truth presents only a limited number of questions and they purely legal.

On examining the record, it appears that judgment was rendered in the Superior Court upon a finding of the issue in favor of the plaintiff; that issue was joined upon the denial by the defendant of the truth of the matters contained in the plaintiff's declaration, the allegations in the declaration are therefore found to be true in fact, and will, I suppose, be treated as true by this court, unless there is something clearly inconsistent with them in the special finding. The judgment which was rendered by the Superior Court is therefore correct, unless the record shows that some rulings of law were wrongly made in the progress of the trial, and these rulings of law must distinctly appear, and the questions must appear to have been called to the attention of the Court at the trial.

This being so, the record presents the following questions and no others:—

1st. The question of jurisdiction.

2d. Is the plaintiff's action of general *indebitatus assumpsit* on the common counts adapted to the case?

3d. Is the fact that the Nathan Seeley notes were not in fact collected from him by the Bethel Bank, or paid to the bank by him, a sufficient legal answer to our action upon the facts found of failure to protest and return the notes, or give notice of non payment?

4th. Do the drafts of Fulton and the checks of Judd constitute in law payment *pro tanto* of the account?

5th. The record states that "all the matters of defence set up in the plea and notice were in issue in the same manner and to the same extent that they would have been if set up and stated in a special plea or pleas at common law, the facts set up in said notice being found true in so far forth as the finding of the court herewith annexed and made part of this record finds them to be true."

The only special facts set up in the notice by way of defence are, 1st, the facts affecting the jurisdiction, and 2d, the notice avers that the claim or pretended indebtedness of said National Bank of Bethel to the said Pahquioque Bank, arose out of transactions that were and are irregular, illegitimate, illegal, fraudulent, and void, &c."

The general issue being found for the plaintiff, these averments of the notice are found untrue, except so far as they may be found true in the special finding. If the special finding discloses that which is illegal, fraudulent and void in the transactions of the plaintiff bank, then whatever questions of law may arise out of such transactions appear upon the record. But the special finding in truth discloses no fraud.

These seem to us to be the only questions which legally appear on the record, and in regard to all of them except that relating to jurisdiction, they are governed by the law of the State of Connecticut, and not by any laws of Congress, and we cheerfully submit that there is no error in the judgment complained of.

4

Submitted by
O. S. Seymour
W. T. Taylor
M. W. Seymour
Counsel for
Defendant

NATIONAL PAHQUIOQUE BANK,
vs.
FIRST NATIONAL BANK OF BETHEL.

ABSTRACT OF RECORD.

In February, 1868, the Bethel Bank failed to redeem its circulating notes, and thereupon a receiver was duly appointed in pursuance of the currency act, and he has duly proceeded as such receiver to wind up the affairs of the bank, (p. 14.)

The Pahquioque Bank presented its claim against the Bethel Bank to the receiver, who disallowed it, (p. 14.)

The Pahquioque Bank thereupon, on the 30th of May, 1868, commenced an action of assumpsit on the common counts against the Bethel Bank, returnable to the Superior Court of the State of Connecticut, at its August term, 1868, service of which writ was made by leaving a copy with the receiver, (pp. 8, 9.)

The Bank of Bethel, by its attorneys, denied the truth of the matters contained in the declaration (and under protest) put itself on the Court for trial, and issue was joined by the plaintiff, (p. 10.)

The defendant with the general issue, filed a notice of special defence, stating the failure of the Bethel Bank to redeem its circulating notes, and the proceedings which resulted in the appointment of a receiver; and that the receiver was in possession of the assets of the bank and in regular discharge of his duties, and that the plaintiff's claim had been presented to the receiver and had been disallowed, and thereupon denying the jurisdiction of the Court, (pp. 11, 12. 13.)

The notice also stated, by way of defence, that the plaintiff's claim

arose out of transactions that were irregular, illegitimate, illegal, fraudulent, and void, between the plaintiff bank and Wm. A. Judd, which transactions were not known to or sanctioned by the other officers of the bank, and are and were without authority and void, &c., (p. 13.)

The facts in regard to the appointment of a receiver and presentment of plaintiff's claim to him and his disallowance of it, are found by the Court substantially as alleged in the motion, (p. 14.) Upon those facts the question of jurisdiction was reserved for advice, and decided in favor of the plaintiff.

The plaintiff filed a bill of particulars, setting forth all the original items of account between the two banks. The plaintiff's account consisted wholly of notes, drafts, and checks sent by the plaintiff bank to the defendant bank for collection, (p. 14.)

In respect to the original items, those which were in dispute consisted of the checks and notes of Nathan Seeley, which from time to time were sent by plaintiff to defendant for collection. These notes and checks were upon the defendant bank, or payable thereat, and were all charged to the defendant unless protested or notice given to the plaintiff of non-payment. These checks and notes, however, were never in fact collected by the defendant, and never paid by Seeley. But the plaintiff was not notified of non-payment unless such notice may be inferred from the facts found in the special finding.

The cashier of the plaintiff bank had given notice to the defendant bank requesting the latter to protest all such notes and checks as were not paid and return them.

The plaintiff bank was the holder for collection of these notes and checks, and had paid to other banks or individuals, from whom the same were received by the plaintiff, the full amount thereof. (p. 14.)

The notes and checks of Nathan Seeley which were not paid were not entered in any way on the books of the defendant bank, and no

officer of the defendant bank, except Judd, had any knowledge of the existence of such checks or notes, or that the plaintiff bank had charged them to defendant.

Nathan Seeley, during all the time the suit was accruing, was a depositor and customer at the plaintiff bank, and often overdrew his account, (pp. 18, 19.)

Upon these facts regarding the Nathan Seeley paper, the question of law was reserved, whether the plaintiff's account for the checks and notes thus not in fact collected, could be recovered in this action, (p. 19,) and the decision of the state court was in favor of the plaintiff.

In regard to the Nathan Seeley paper, however, this following further finding is made. Said Judd, as cashier of the defendant bank, a short time before the appointment of said receiver, without the knowledge or consent of any of the officers of the defendant bank, took from Seeley his note, endorsed by Isaac H. Seeley, for the amount of these uncollected checks and notes. Said Tweedy, as receiver, presented this note, for the benefit of whom it might concern, to the insolvent estates of Nathan and Isaac H. Seeley, and received a dividend therefrom, (p. 19.)

On the 28th of February, 1865, there was due to the plaintiff a balance of $25,083 17, to provide for the payment of which, Judd, as cashier, caused to be delivered to the plaintiff certain drafts of one Fulton. The net proceeds of these drafts was credited to the defendant in account. These drafts were endorsed by Judd, cashier, but without saying of what bank, and the drafts, in fact, were not discounted or owned by the defendant bank. These drafts have been paid in part and from time to time renewed, so that there remains due on them $7,475 65, which sum the Judge finds now due as the balance of the account of $25,083 17, unless the drafts so received constituted payment of the original account in contemplation of law. There was no agreement between the parties that the plaintiff should receive them as payment, (pp. 16, 17.)

Upon facts, of which the foregoing is the substance, the question was reserved whether these drafts constitute payment in law, (p 19,) and the decision of the state court was in favor of the plaintiff.

On the 1st October, 1867, the plaintiff claimed a balance of $42,431 01. To provide for the reduction of this balance, Judd, as cashier, without the knowledge or consent of any of the other officers of his bank, drew checks on the defendant bank, all signed W. A. Judd, cashier, payable to W. P. Seeley, cashier, or order. All the checks amounted to $35,000. These checks were on the plaintiff's books credited to the account of W. A. Judd, cashier, and charged to loan account to W. A. Judd, cashier.

No agreement was made between the parties to receive said checks as payment other than such as may be implied from the facts herein found, (pp. 17, 18.)

These checks have never been paid, are still held by plaintiff, and never been presented to defendant bank for payment, and the plaintiff has never delivered nor offered to deliver, to the defendant bank, any of the aforesaid checks.

Upon these facts the question was reserved whether these checks constituted payment *pro tanto* of the plaintiff's account, (p. 19,) and the decision was in favor of the plaintiff.

The matters of defence set up in the notice that the plaintiff's claim arose out of transactions that were irregular, illegitimate, illegal, fraudulent, and void, are not in the special finding found to be true as applicable to the plaintiff bank.



83- ~~Hou~~ Hou- Carr

2 ~~Hall~~ Hall 127

all 5 Fell 1867

7 Ball -

---

6 Ball 506

1 Kennedy 2 Gibson

1 Hall 202

---

5 Day -

9 Conn

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. ~~215.~~ 116

THE FIRST NATIONAL BANK OF BETHEL,

Plaintiffs in Error,

v.

THE NATIONAL PAHQUIOQUE BANK,

Defendants in Error.

REPLY OF THE PLAINTIFFS IN ERROR.

EVENING POST STEAM PRESSES, 41 Nassau St., cor. Liberty.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

U. S. Supreme Court,

DECEMBER TERM, 1871.

FIRST NATIONAL BANK OF BETHEL,
Plffs. in Error,

agst

THE NATIONAL PAHQUIOQUE BANK,
Defts. in Error.

Reply of the Plaintiffs in Error to the argument of the Defendants in Error.

It is respectfully submitted that no one of the questions discussed and relied upon by the plaintiffs in error, or by the defendants in opposition, are governed by any statute or supposed common law of the State of Connecticut. They are to be determined by a construction of the laws of the United States which regulate the banking associations of the United States, and upon the consideration and application of such general principles of law as are pertinent to the questions which may arise under the pleadings and the "Facts Found"

by the court. The defendant in error had as much right to commence their suit in the District or Circuit Court of the United States as they had in the State Court, in which it was commenced. (Sec. 57 of the act.) If they had commenced their suit in the Circuit Court of the United States, the local law of Connecticut could not control the judgment of the Court, or of this Court, as the Court of last resort, in relation to either of the questions which the case presents for consideration and adjudication. The propriety of this view of the case is sustained by the character and purpose of the banking associations of the United States, which were established mainly and primarily for the use and convenience of the government, and as a means by which it might discharge some its most important trusts and duties; and which are controlled, to a large extent, by a Bureau of the Treasury Department, and, more or less, under the direction and supervision of the Secretary of the Treasury.

The Bank of Bethel, on the 21st of February, 1868, refused to redeem its circulating notes; such refusal, in the language of the 8th Section of the act of Congress, constituted "a violation of the act," and if established in the manner provided and pointed out in the act (Sec. 46–50), produced a forfeiture of its franchise. The comptroller of the currency, having information of this refusal, notified the bank thereof (Sec. 46), appointed a special agent to examine into the truth of the matter; upon whose report the Comptroller, on the 26th of February, appointed a receiver, who took, and has retained, possession of the bank, its books and assets. The corporation did not, within ten days after it had been notified of the appointment by the Comptroller of an agent (Sec. 46), apply, as it might have done, to the nearest Circuit or District Court of the United States (Sec. 50), to enjoin further proceedings of the Comptroller against the bank. The authority of the Comptroller, the validity and effect of his action, the consequences which legally resulted therefrom in relation to

the *status* of the bank, are questions dependant for their solution upon the laws of the United States as they may be construed by the Courts of the United States. The action of the Comptroller, as the plaintiffs in error submit, produced an exemption on the part of the bank from any subsequent suit at law in any Court; an immunity and protection from suits at law. Whether this is so or not, does not depend upon, and is not the subject matter of State or local law. The defendants in error resist the effect of this action of the Comptroller by saying it deprives them of their supposed common law right, under the local law of Connecticut, to maintain an action, and to have a trial by jury to establish any claim they may make; that a corporation cannot be dissolved; cannot be discontinued or exempted from libility to suit, except by the institution of judicial proceedings; that is, that a banking association of the United States cannot be arrested in its cause, upon its refusal to redeem its circulating notes, except by the action of the Attorney General of the United States; or by an officer of similar grade acting under the State of Connecticut. That the comptroller of the currency is not a judicial officer; that he holds his office at the pleasure of the national executive.

At the same time the defendants in error concede that they had no right, at the time the suit was instituted, to levy their writ of attachment upon the assets of the Bank of Bethel; and, as the junior counsel of the defendants in his opening argument said, they directed the officer who served their writ to disregard its command to attach the goods and estate of the Bank of Bethel. This is a concession that the authority conferred by the writ, and by the Court from which it issued, had ceased and had been taken away, *pro tanto*, at least by the action of the Comptroller. This concession of part is a concession of the whole when applied to the facts of the case at bar. The action of the Comptroller, it is respectfully submitted, was not judicial; it was ministerial, and in the exercise of a power conferred

upon an executive branch of the Government. Although a corporation may be dissolved—may be discontinued—or its corporate franchise suspended by judicial action, it does not follow, or result therefrom, that the sovereignty which creates, or authorizes the creation of, a corporation cannot impose terms upon its grant, cannot provide for or direct the dissolution, discontinuance or suspension of the functions of a corporation, by the action of a commission, or by the action of a public officer who does not hold judicial rank; and this is especially true in relation to corporations created for the public purposes of the sovereignty by which it is created.

Carey vs. *Curtis*, 3 *How.*, 236, (Brief, p. 15): In this case all the reasons upon which the defendants in error now rely, were urged with eminent ability by the late Mr. Justice Story, without effect.

Nichols vs. *United States*, 7 Wallace, 127, cited in the opening argument of the plaintiffs in error.

Murray vs. *Hoboken Land Co.*, 18 How., 272: "A distress warrant issued by the solicitor of the treasury under the Act of 15th May, 1820 (3 Stat., 592), is not inconsistent with the Constitution. It was an exercise of executive and not judicial power. After a distress warrant the collector (against whom it issued) may apply to a District Court to determine whether he is indebted (page 284). These are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the Courts of the United States, as it may think proper. It is true, also, that even in a suit between private persons, to try a question of private right, the action of the executive power upon a matter committed to its determination by the Constitution and law is conclusive."

The status of a banking association, under the Act of Congress, is a matter involving public rights as well as private; and the constitutional right of Congress to regulate the status, is as clear as is its right to authorize the issue of a distress warrant against a collector, by the Solicitor of the Treasury; or to authorize the Secretary to determine whether an excess of duty has been paid, and if he finds it has, thereupon to refund the money to the party who made payment.

The provision in the Bank Act of 1864, Sec. 50, that the comptroller may be enjoined and restrained, by a Court of the United States, if his action was unadvised or inadvertent is the protection and all the protection to which the bank can make claim, and is all the protection which private parties dealing with the bank, with their eyes open to the law of the corporation, can ask or receive.

Watson vs. *Tarpley*, 18 How., 520:

"Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that their laws cannot affect, either by enlargement or diminution, the jurisdiction of the Courts of the United States, as vested and prescribed by the laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these Courts has been secured by the laws and constitution."

The Court refer to *Swift* vs. *Tyson*, 16 Peters, in which the 34th Section of the Judiciary Act was discussed, and in which the Court said: "It never has been supposed that this section did apply, or was intended to apply to questions of a more general nature not at all dependent upon local statutes or local usages of a fixed and permanent nature; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general com-

mercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or what is the just rule furnished by the principles of commercial law to govern the case."

Ableman vs. *Booth*, 21 How., 506:

"This Court has appellate power in all cases arising under the Constitution and laws of the United States, with such exceptions and regulations as Congress may make, whether the cases arise in a State Court or in an inferior Court of the United States. And under the act of 1789, when the decision of the State Court is against the right claimed under the Constitution or Laws of the United States, a writ of error will lie to bring the judgment of the State Court before this Court for re-examination and revision." *Page* 513.

"The Supreme Court of the State of Wisconsin claimed and exercised the right to supervise and annul the proceedings of a Commissioner of the United States."

This purpose of the Wisconsin Court failed of its accomplishment, and a similar attempt of a State Court of Connecticut, by means of a writ of attachment against the Bank of Bethel indirectly, to supervise and annul the action of the comptroller, must be equally unavailing.

The legality of the action of the comptroller upon the Bank of Bethel; the effect of such action; the result which it may produce upon the rights of the United States, which have a first and permanent lien upon the assets of the bank in the event of its insolvency; the effect upon the corporation; upon its assets and the rights of creditors, in the distribution of such assets, are questions dependent exclusively upon a law of the United States, and not upon any statute, or local, or supposed common law of the State of Connecticut; and

if the action of the comptroller can be sustained under the Constitution and Statute of the United States, under which he professed to act, the defendants in error had no *right of action* in any Court of law against the Bank of Bethel, at the time their writ of attachment was issued. If they have any claim they are remitted to the mode and officer which the Act of Congress has prescribed as applicable to the winding up of an association which has violated the act, under which it was organized. The supposed creditor must conform to the changed status and condition of the corporation.

Wallace vs. *McConnell*, 13 Pet., 131–156:

"Proceedings in a State Court by attachment commenced after the institution of a writ in a Court of the United States, cannot arrest the proceedings in such Court."

The same doctrine applies when a bank and its property are in the custody of the United States. This principle was recognized and acted upon in the case of *Harris* vs. *Dennie*, 3 Pet., 292.

Duncan vs. *Dart*, 1 How., 301:

"A person in custody under a capias issued by Circuit Court, cannot be discharged by a State officer."

The Bank of Bethel is in the custody of the United States; and if the custody was constitutionally obtained, no State Court can take jurisdiction to disturb such custody, or call upon the bank to implead with any supposed creditor, for the purpose of settling the right of such creditor to share in a distribution, which may be made by the Comptroller, of the assets of the corporation; and without reference to the suit of the defendants in error.

Minnesota vs. *Batchelder*, 1 Wallace, 109:

"Error will lie to a Supreme Court of a State under

the 25th sec. of the Judiciary Act, when a statute of the United States is technically in issue in the pleadings or is relied on in them and is denied by rulings asked for and refused, even though the case may have been disposed of generally by the Court on other grounds." *Page* 116. "A point is made whether this Court has jurisdiction under the 25th sec. of the Judiciary Act. But the right of the State to these school sections rests upon acts of Congress which were set up and relied upon in this case, and the decision of the Court below against it."

Chicago vs. *Robbins*, 2 Black, 418–28:

"When private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decision."

In the opening argument of the plaintiffs in error, positions 3, 4 and 5, Brief, pp. 11–15, it was submitted that the Bank of Bethel, at the time the original suit was instituted, had no right to pay (secs. 46 and 52), but were in express terms prohibited from making any payment to creditors or stockholders, and, as a consequence, were not liable to suit. That the Act of 1864, under which the bank was organized, had prescribed a particular mode of proof against the assets of a bank which had been seized by the comptroller and taken into the custody of the United States, which mode of proof excluded all other modes.

That the defendants in error have presented the identical claim which constitutes the subject matter of their suit to the receiver for allowance, who, in this respect, was merely the agent of the comptroller; that the receiver disallowed it, reported his proceeding to the comptroller, and gave notice of such disallowance to the defendants in error, prior to the institution of their suit.

That this presentation of claim by the defendants in

error made them parties to the proceedings instituted by the comptroller, and that thereupon the defendants in error had no legal right to commence a suit at law against the corporation, and that the State Court of Connecticut had no jurisdiction to arrest the assets of the bank, or to sit in review upon the decision of the receiver, which, in contemplation of law, and in accordance with the terms and course of proceeding under the Act of Congress, was the decision of the comptroller, upon whom alone the power of decision is conferred (sec. 50); unless upon consideration of the report of the receiver, or upon the application to him of the defendants in error, he should entertain a different opinion, and thereupon admit the claim.

These positions depend upon the construction of a law of the United States, and are to be determined ultimately and exclusively by this Court, and not by any Court of the State of Connecticut. The grounds and reasons upon which these positions are taken are shown upon the brief of the plaintiff in error (pp. 11–16), and need not be repeated, they are sustained also, by the cases cited, *supra*.

It results from the provisions of the act cited, that defendants in error, at the time their suit was instituted, could not attach the assets of the plaintiffs in error; could not sue the comptroller in a Court of common law, State or national; could not directly or indirectly enjoin or restrain the comptroller from distributing the assets in his hands, without reference to the suit against the corporation, notwithstanding a copy of the writ was given to the receiver. (*Proviso, sec.* 57).

The defendants in error resist these positions and conclusions, because the Act, sec. 50, in directing the comptroller to distribute the funds in his hands, after the payment of any balance due the United States, directs that he shall make a ratable dividend of the money on all such claims as may have been proved to his satisfaction *or adjudicated in a Court of competent jurisdiction.*

If the argument of the defendants in error, deduced from these words prevails, the entire system of winding up a banking association of the United States, which has violated its act of incorporation and thereby forfeited its franchise, in the manner provided by the act, is destroyed.

The words upon which the defendants in error rely do not give, and were not intended to give any right of suit, or action, against the corporation; certainly not a right to appeal, from an adjudication of claim made by the comptroller, acting upon the report of his agent, the receiver, by the institution of an action at law in a State Court of Connecticut. The defendants in error rely also upon sec. 53, which provides for the dissolution of a banking association by a suit in the name of the comptroller, not the attorney general, based upon the alleged misconduct of the directors; which, if established, subjects them personally to the damages resulting from their misconduct. The fact that the act provides in one instance for a dissolution by suit does not, it is respectfully submitted, destroy or take away the power and authority of the comptroller, in five other cases, to ascertain the fact of violation of the act, by the appointment of a special agent, with the approval of the secretary, and upon his report, if satisfied therewith, to wind up an association, by seizing upon the bank and its assets without judicial process or aid, except so far as judicial sanction may be inferred by the neglect of the bank to restrain the operations of the comptroller, by applying to the nearest Circuit or District Court of the United States as provided in sec. 50.

The defendants in error must therefore rest upon sec. 8 and 57, as the authority upon which to rest their right to commence suit after the action of the comptroller. The right of action given to a creditor or claimant under sec. 57, cannot be applied to sustain the suit commenced by the defendants in error under

the circumstances and changed condition of the bank detailed in the facts found." The construction for which the plaintiffs in error contend gives full force and effect to all the provisions of the Act of Congress; a contrary construction defeats them.

The position contained in the brief of the plaintiffs in error, numbered 6–10, depend upon other considerations, which are given in the brief. The questions thus presented are to be determined upon general principles, and not upon the local law of Connecticut. From the "Facts Found," it appears that the Pahquioque Bank received for collection sundry notes and checks which it remitted for the same purpose to the Bank of Bethel; each bank acting without reward or compensation. It is submitted that the legal capacity of the Bank of Bethel to enter into such a contract must be determined by a construction of the Act of Congress under which it was organized, If this be conceded, upon what ground can the construction and effect of such contract be deferred to the exclusive jurisdiction and adjudication of a State Court. The law of a contract, and *the rights* resulting therefrom, is the law of the sovereignty or country under which and by which it is authorized to be made.

The State of Connecticut, by statute, or other local law, has no right to determine whether a banking association, under an Act of Congress, shall or shall not receive mercantile paper for collection; cannot determine the consequences which shall result from a refusal to undertake such collection, or undertaking it, which shall result from a negligent performance of the duty. Whether the checks of Judd upon the Bank of Bethel, of which he was cashier, payable on demand, received and discounted by the Pahquioque Bank, and the proceeds credited to the Bank of Bethel, thus diminishing its apparent indebtment, at times when the banks were required to make quarterly returns, under the law, as it then stood (since changed), were issued

and received as the plaintiffs in error submit (position 10) for a fraudulent purpose, and with an intention to deceive the comptroller, is to be determined by a construction of the Act of Congress and not by any local law of Connecticut.

It was suggested at the argument whether a suit might not be instituted against the receiver in his official capacity, for the purpose of establishing a claim against the bank. No such suit has been instituted, and it is submitted that he is not liable in his official position to be impleaded in a State Court by a claimant or creditor against the Bank of Bethel. In this respect he has all the immunity and exemption from suit which the Act of Congress confers upon the comptroller of the currency.

The plaintiffs in error contended, in the Court below, that, if responsible for negligence, they were liable only for nominal damages, insomuch as N. Seeley, the maker of the uncollected paper, had no funds at the Bank of Bethel, or elsewhere, with which to pay it—and that no party to the paper had been discharged. These questions are not dependent for their solution upon any local law of Connecticut, but upon the general principles of law applicable thereto. In the language of this Court, both parties claim under an Act of Congress.

Ross vs. *Barland*, 1 *Peters*, 664; *Matthews* vs. *Lane*, 4 *Cranch*, 382. In this case the Court say: "It is supposed that the Act (the Judiciary, sec. 25) intends to give this Court the power of rendering uniform the construction of the laws of the United States, *and the decisions upon rights or titles claimed under these laws.*"

The right of the defendants in error to sue the Bank of Bethel before its seizure by the Comptroller, the right to share in the assets of the bank, which are in his hands, depend upon a statute of the United States.

The defendants in error repose somewhat upon their supposed good faith and willingness to have their operations with the Bank of Bethel scrutinized; this

scrutiny can be had by an examination of the "Facts Found," to which the plaintiffs in error have called the attention of the Court under the tenth position in their brief. Whether these facts, in contemplation of law, constitute fraud is a matter for the determination of the Court, dependent upon general principles and not upon any local statute or common law of Connecticut. The facts having been found, the deduction of "fraud or no fraud" is purely a question of law. The Court below (Opinion, p. 8) say: "The finding shows gross fraud on his part (Judd, cashier of the plaintiffs in error) by colluding with Seeley to permit his paper to accumulate in the bank unpaid; by failure to enter the paper upon the books of the bank, or to inform the directors of its possession and non-payment, and in permitting the accounts of the plaintiffs to accumulate in such *an unusual manner*, and to such an unusual extent without informing them of it. It also shows gross negligence in the officers of the defendants' bank (the plaintiffs in error) in entrusting the entire management to Judd. But these facts do not constitute a defence *unless knowledge* of them can be brought home to the plaintiffs (the defendants in error). The transactions were loose, and, looking to the amount ($50,000) of the defendants' capital (plaintiffs in error), unusual, and it would seem that suspicion, at least, must have arisen in the minds of the officers of the plaintiffs' bank (the defendants in error), but the Court below (Judge Loomis) has not found knowledge, or even suspicion, and there are no facts which will justify us in inferring *such knowledge as matter of law.*"

In this conclusion the Court below (Supreme Court of Errors) clearly erred. That the defendants in error had *knowledge* of the unusual and extraordinary accumulation of the unpaid and uncollected paper of Nathan Seeley is most distinctly apparent from the "Facts Found." The Judge of the Superior Court, by whom the facts were found, made a portrait, had drawn a very graphic picture, but did not write its name underneath;

the law writes its name in language not to be mistaken. Whether these facts constitute fraud is a question of law dependent upon general principles, and not upon any statute or local law of Connecticut.

The United States, in their sovereign capacity, have authorized the establishment of certain baking associations for public purposes, although private individuals may incidentally receive benefits therefrom; they have prescribed the mode in which, and the officer by whom, any violation of the act by an association may be ascertained; upon the ascertainment of such violation, they have authorized an officer of the government, acting more or less under the approbation of the Secretary of the Treasury, *to close up, to wind up*, such asssociation; to declare the bonds pledged by it, as security for the circulating notes, as forfeited; to sell them for the purpose of redeeming such notes. The comptroller, by means of a receiver, seizes upon the bank and its assets, notifies claimants to make proof of their claims to his satisfaction; and unless restrained by a Court of the United States, pays such balance, if any, as may be due to them; subsequently distributes the assets to creditors, and the surplus, which may remain, is paid to the shareholders and not to the corporation. The effect of this may be, and is, to deprive a creditor of the association of any right to institute an action at law against the association, the condition and status of which has been changed by the action of the government in conformity with the law of its creation, of which law every person dealing with the association has knowledge, and acts under such knowledge. It is respectfully submitted, that it is within the constitutional power of the government so to create, and so to close up, the banking associations of the United States.

The government may exempt itself from suit, it may exempt its officers from suit, by reason of any official act; it may most assuredly confer upon corporations

established to enable the government to perform its trusts, *an immunity* from suit under certain prescribed conditions. The defendants in error might have applied to the comptroller, to whom the receiver made his report, for permission to present additional evidence, or for a consideration by him of the merits of their supposed claim. If they had, or now have any other remedy, which is not conceded, it must be sought and had in a Court of the United States, exercising its equity jurisdiction, and not by an action at law, in any Court.

The defendants in error, by argument, in effect say that by force of their supposed contract, the Comptroller has been deprived of his authority to wind up a banking association, which, by a violation of the act of Congress, has forfeited its franchise; that every creditor or claimant, notwithstanding the action of the Comptroller, may maintain an action against the corporation, to which suit he cannot be made a party; that this may be done, even after he has rejected the claim. If such is the character of the act, its purpose has failed. If the defendants in error, on the 30th of May, 1868, had no legal right to institute their suit, the argument that they will be deprived of a jury has no application. The argument, if it has any force, must go the length of saying the act of Congress which provides for closing up a corporation, created by itself for public purposes, in the manner and by the officer prescribed in the act, is unconstitutional.

If creditors may maintain their suits at common law after the appointment of a receiver, and recover interest as the defendants in error have in the case at bar, an inequality must of necessity arise between creditors, resulting from the different dates at which their judgments may be obtained. It is clear from the character and purpose of the act, that the Comptroller, in ascertaining the claims upon which distribution is to be made, must state them as they existed at the time he took possession.

The defendants in error, in their closing argument, insist that the only provision for the dissolution or discontinuance is found in the 8th section of the act, which provides that the corporation shall continue for a period of twenty years, unless sooner dissolved according to its articles of association, or by the act of the shareholders owning two-thirds of its stock; or by a suit at law under section 53, based upon the misconduct of the directors. In this view of the case, the counsel omit altogether some of the words in the 8th section; by which it is provided, "such association shall have succession for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, *or unless the franchise shall be forfeited by a violation of this act.*"

These last words are omitted by the counsel of the defendants in error, and no reference is made to the five different causes named in the act, which authorizes the Comptroller to close up, to wind up an association which has violated the act. In the view of the defendants in error the corporation, notwithstanding the action of the Comptroller and of the provisions contained in sections 46–50, and 52, is in existance for the purpose of being sued, and for the purpose of enabling a claimant to appeal from the decision of the Comptroller, by means of an action at law against the corporation; even if the corporation was not technically dissolved or discontinued, it was exempt from suits at law, at the time the defendants in error commenced their action.

The defendants in error, in their closing argument, insist that the objection to the jurisdiction was not set up by plea in abatement. This was not necessary. Objection to jurisdiction may be taken by plea in abatement or by plea in bar. In the case before the Court the objection may be pleaded in bar, because no Court could entertain suit under the circumstances presented. (See cases upon the brief of the plaintiffs in error, p. 15.)

The objection was taken at the time of the filing of the answer, which was put in *by order of Court, and under protest.* The doctrine is sustained by the law of Connecticut, so far as the form of pleading is concerned.

Referring to Connecticut cases:

Burgess *vs.* Tweedy, 16, Conn. Reports, pp. 39, 43, 44. Williams, Ch. J., "Whatever remedy may exist elsewhere, we think that by the practice *in this* State, it is settled as asserted by the late Ch. J. Swift, that when the party has no legal capacity to appear, a writ of error will lie." 1st Sw. Dig., 790.

Stonnington *vs.* States, 31, Conn. Reports, &c., 213.

"A judgment void by reason of want of jurisdiction in the Court may be reversed upon writ of error. The writ is given by statute in the case of every final judgment.

"Writs of error in such cases have been sustained at common law in this country and in England, and even where brought by the original plaintiff."

Sears *vs.* Terry, 26 Conn. Reports, 273, 280. "A "Court must have jurisdiction over the parties, the "subject matter and the process or its proceedings are *co-* "*ram non judice.*"

Also Grummon *vs.* Reymond, 1st Conn. Reports, 44.

Stalker *vs.* State, 9 Conn. Reports, 341, 344. A writ of error is *stricti juris*, however trivial error may be.

Sharp, &c., *vs.* Rowan, 34 Conn. Reports, page 329.

"When the jurisdiction of a Court depends on the "party, it is the party on the record."

Citing, Irwin *vs.* Leroy, 14 Peters, 293; and Bonnaface *vs.* Williams, 3 Howard, 574.

Osborne *vs.* Bank, &c., 9 Wheaton, 738.

Hart *vs.* Granger, 1st Conn. Reports, 154, 169. "Consent of parties cannot give jurisdiction."

Also:

Andrews *vs.* Wheaton, 23 Conn. Reports, 112; Com. Bank *vs.* Slocomb, &c, 14 Peters, 60. "A plea to the "jurisdiction by a corporation put in by its attorney "is good."

That is, appearance does not cure a want of jurisdiction and is no waiver.

Also 2d of Abbott, U. S. Practice, page 49. Nor can consent confer a jurisdiction. 2d Abbott U. S. Practice, 214.

Under the head of *consent* to the jurisdiction.

Kellogg *vs.* Brown, 32 Conn. Reports, pp. 108, 111, 112, reporter's note.

As to the effect of notice under the general issue of the want of jurisdiction, see Statutes of Connecticut, Revision of 1866, page 23. Also record in this case, pp. 14, 15, 16.

Construction of similar statutes in Maine. Sturdevant *vs.* Randle, 53 Maine Reports; pp. 149, 150.

"The brief statement" (that is the notice), "when "made with sufficient precision, becomes to all intents "and purposes a substitute for the special plea the "place it is allowed to supply."

In all the cases yet reported concerning national banks in the hands of receivers, three things are assumed:

1st. That the bank is defunct.

2d. That the receiver is the party, if any one, to sue and be sued.

3d. That the suspended bank cannot be sued.

Venango National Bank *vs.* Taylor, 56 Pennsylvania Reports, 14.

Claflin *vs.* Bank, 54 Barbour, 228. Platt's petition, 1st Benedict, C. C., 534. Held, that this Court was a Court of competent jurisdiction. Also 2d Benedict, same case, pp. 303–316.

Also same case, 8th Abbott U. S. Practice.

Turner *vs.* First National Bank of Keokuk, 26 Iowa Reports, 562.

Also John H. Van Antwerp *vs.* H. R. Hulburd, &c., 7th Blatchford C. C. Rep., 426, 439, 440, where it is assumed that the unenjoined action of the Comptroller terminates the legal existence of the bank.

The briefs of the defendants in error, both claim that under section 50, of the Currency Act, a National Bank in the hands of a receiver, may be sued in a State court, on a claim rejected by the receiver, after due presentation to him, and notice of such rejection, and that this may be done without the consent of the receiver, without making him a party, and without alleging any previous action of the receiver, in the premises.

If there is error in any of these positions, either as to the party to be sued, or the court in which suit is to be brought, the first five assignments of error by the plaintiff in error (Record pp. 12 and 13), are sufficient and conclusive.

Our claim on the other hand is:

1. That neither the bank nor the receiver, after the

rejection of a claim by the receiver, can be sued in any court of law.

2. That, if either can be sued in any court, it must be in a court of the United States, sitting in equity, and not in a State court.

3. That, if suit can be brought in a State court, it must be against the receiver, or at least he must be made party to the record.

The words "adjudicated in a court of competent jurisdiction"—(1) cannot refer to adjudications in a State court, for the *association* being *no longer alive*, it cannot be held that the provisions of section 57 have any bearing upon this question; and (2) cannot refer to adjudications between claimants and the defunct bank, but to adjudications between the claimants and the receiver.

As the receiver is the party who is to bring suits, either in his own name or in the name of the association *for his use* (Kennedy *vs.* Gibson, 8 Wall, 506), so, according to the principle and reasoning of that case, he, or the association, *through him*, must be made a party.

Unless he is so made a party, sec. 50 plainly confers no jurisdiction on the claimant suitor, and certainly sec. 57 gives no right to sue a receiver in a State court.

The Pahquioque Bank is attempting to do indirectly, what by law it cannot do directly.

If the suspended bank is not put in a state of forfeiture by the action of the Comptroller in the appointment of a receiver, which forfeiture is complete at the end of the ten days allowed for an injunction, when does the existence of the bank terminate?

In their briefs the defendants in error claim that it cannot terminate until twenty years from its organization. We submit that it is incredible that the law-makers

could have intended such an indefinite protraction in the winding up.

We desire to be distinctly understood as not waiving or giving up any of the points made in our assignment of errors, all of which, we think, can be taken advantage of under the present pleadings, according to the decisions cited from the Connecticut Reports.

It was not necessary to plead incapacity in the Court below.

In all cases, in judgments complained of as erroneous, where the error assigned is that the party against whom judgment has been rendered, is incapable of being sued, if the fact of incapacity appears from the finding of the Court, it is not necessary that such incapacity should originally be set up in abatement or in bar, or by any pleading whatever. A party incapable of being sued, is incapable of pleading to a suit. This principle applies to cases of infants, *non compotes*, corporations whose charters have been repealed, and is equally applicable to the present case.

There is then and has been no waiver, because the record shows that there is no party capable of making a waiver.

C. B. GOODRICH,
ROGER AVERILL,
LYMAN D. BREWSTER.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. ~~315.~~ 116

THE FIRST NATIONAL BANK OF BETHEL,
Plaintiffs in Error,

vs.

THE NATIONAL PAHQUIOQUE BANK,
Defendants in Error

ARGUMENT FOR THE DEFENDANTS IN ERROR,

SUBMITTED IN WRITING BY

ORIGEN S. SEYMOUR, of Counsel.

NEW YORK:
EVENING POST STEAM PRESSES, 41 NASSAU STREET, COR. LIBERTY.

1872.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

THE FIRST NATIONAL BANK OF BETHEL,
Plaintiffs in Error,

vs.

THE NATIONAL PAHQUIOQUE BANK,
Defendants in Error.

Argument for the Defendant in Error submitted in writing by Origen S. Seymour, of Counsel.

On the 30th day of May, A. D. 1868, the National Pahquioque Bank of Danbury, Connecticut, brought its action of *indebitatus assumpsit* on the common counts, against the National Bank of Bethel, located in Bethel, Connecticut. The action was brought to the proper State Court "having jurisdiction in similar cases," viz., to the Superior Court for the county of Fairfield, within which county both banks were located.

The process was in due form and duly served according to the laws of the State of Connecticut. The defend-

ant bank appeared by Attorney; entered no plea in abatement, and went to trial on the general issue; with notice, as on file.

The two questions before the Superior Court in Connecticut were:

First.—Had the Court jurisdiction of the subject matter and the parties?

Secondly.—Was the defendant bank indebted as alleged?

Both questions were decided in favor of the Pahquioque Bank. The first question is subject to review by this Court on writ of error, and is the only question really requiring discussion.

In the brief already submitted by the defendant in error, the several objections to the jurisdiction made by the plaintiff in error are carefully discussed. If my health had allowed me to address the Court, I had intended to approach the subject in the opposite direction from that taken in our brief, and taking on myself the affirmative, to insist that the jurisdiction of the State Court was clearly given by the Currency Act; and I intended to show the value, the importance and necessity of that jurisdiction in a case situated precisely as this case of the Bethel Bank is. The 57th section of the Currency Act is as follows:—"That suits, actions and proceedings against any association under this act may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established, *or in any State, County or Municipal Court* in the county or city in which said association is located, *having jurisdiction in similar cases.*"

If, then, the Bethel Bank was in existence as an association under the Currency Act at the time our suit was brought, then, by the direct and positive terms of this section, that institution is made liable to our suit, and subjected to the jurisdiction of the State Court. The 8th section of the

Currency Act provides "That every association, formed pursuant to the provisions of this act, shall, from the date of the execution of its organization certificate, be a body corporate * * * * * shall have power to adopt a corporate seal and shall have succession by the name designated in its organization certificate, *for the period of twenty years* from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act: by such name it may make contracts, sue and be sued * * * " By the express terms of this section, the Bethel Bank *must* remain in existence twenty years unless dissolved in one of the three modes provided for in this last mentioned section. It is submitted that the Bethel Bank has not been dissolved according to any reasonable construction of those terms. There is no pretence that such dissolution had taken place "according to the provision of its articles of association" or by "the act of the shareholders owning two-thirds of its stock."

And it is submitted that the forfeiture for a violation of the act referred to in this section, is the forfeiture spoken of in the 53d section of the Currency Act, which section is in these words:

"That if the directors of any association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this act, all the rights, privileges and franchises of the association derived from this act shall be thereby forfeited.

Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial Court, of the United States, in a suit brought for that purpose by the Comptroller of the Currency in his own name, before the association shall be declared dissolved, and in cases of such violation, every director who participated in or consented to the same, shall be held liable in his personal and individual capacity for all

damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

This last section is the only other section in the Currency Act, relating to the forfeiture by a bank of its charter; it declares how or when its charter shall be forfeited, and such forfeiture must be pronounced in a judicial proceeding instituted for that purpose.

When, therefore, the Eighth section refers to a forfeiture, it necessarily refers to the forfeiture referred to in the Fifty-third section, and to no other; a comparison of these two sections will at once satisfy the minds of the Court of the correctness of this view of the subject. If, then, I am right thus far, the provision of the Eighth section absolutely declares the continued existence of the Bethel Bank, and when the plaintiffs in error say, as they do, that the Bethel Bank is not in existence, they do not construe the Currency Act, but squarely and fairly contradict it. There is no reason to doubt that this Eighth section expresses the true will of Congress in regard to the continued existence of these associations, and it is difficult to conceive any proper purpose which the plaintiff in error seeks to accomplish by asking this Court to say one thing, while the statute, by its plainest terms, says the contrary. For a full discussion on this subject I refer to our brief, already submitted, pages 5 to 8, and will only add here, that those who drew the Currency Act were well aware of the importance of the continued existence of corporations, and cannot be presumed to have left that subject in the state of uncertainty in which it would be left, if the arguments of the plaintiff in error be well founded.

All that it is necessary for us to claim here is, that the Bethel Bank continued in existence nothwithstanding the appointment of a receiver, so far at least as to be the subject of a suit brought against it for the important and necessary purpose of ascertaining, through the medium and by means of such suit, the extent of the liabilities of said

bank to creditors. The fact of such continued existence, for that purpose, is indicated by the circumstance that no mode is provided for the ascertainment of the liabilities of the bank by judicial proceedings, except in this manner. It is still further indicated by the fact that by means of such suits, or the continued existence of the Bethel Bank to be the subject of such suits, is provided, where claims are contested, an easy and natural mode for the ascertainment of the liabilities of a bank in the hands of a receiver; and finally, by the terms of the act itself, the same thing is clearly indicated. The 50th section of the Currency Act provides as follows: "* * * And from time to time the Comptroller, after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction *or adjudicated in a court of competent jurisdiction;* and from time to time, as the proceeds of the assets of such association shall be paid over to him, he shall make further dividends as aforesaid on all claims previously proved *or adjudicated.*" The adjudication in this section referred to is an adjudication by means of a suit like that brought by us against the Bethel Bank.

It will not escape the attention of the Court that the same argument of the plaintiff in error, which assails the jurisdiction of the State Court, assails also, to the same extent, the jurisdiction of the Courts of the United States. Both Courts are placed on the same ground by the 57th section of the Currency Act, and both State and Federal Courts stand on the same footing as to the continued existence of the Bethel Bank. If the Bethel Bank is in existence to be sued in the Courts of the United States, it is also in existence for the purposes of a suit in the State Court.

This Court, then, is called upon by the plaintiff in error, to adopt such a construction of the Currency Act

as to leave parties having claims against the Bethel Bank, without any resort to any judicial tribunal for the purpose of ascertaining the justice or amount of their claims.

It has, to my mind, the appearance of some absurdity that a corporation should be permitted to set up as a defence against the claim of a creditor that it has no longer any existence, because it has failed to meet its own liabilities; thus resisting a just claim, not only by taking advantage of its own wrong, but resisting a judgment, where, if the argument of the plaintiff in error were true, the judgment could, by no possibility, aggrieve the defendant.

It is submitted that such a construction is inconsistent with the Currency Act, in all the particular provisions above referred to; inconsistent with the whole scope and spirit of the act, and inconsistent with the laws of natural justice. The currency act is drawn throughout with remarkable clearness, fullness, completeness, and force. It is inconceivable, that the legal, financial, and practical talent engaged in drafting that important act should have left so e sential a matter as the adjudication of claims against associations in the condition of the Bethel Bank, with no provision for their adjustment. The construction contended for by the plaintiffs in error inflicts a wound on the entire act; while the construction for which we contend is in harmony and keeping with all its parts.

By the construction claimed by the plaintiffs in error, the Comptroller or Receiver is created a judicial tribunal, having sole and exclusive jurisdiction, before whom parties, with their witnesses, must appear from every State in the Union, and from whose decision no appeal lies, and where the constitutional right of trial by jury is denied.

It is suggested in the brief of the plaintiff in error, that the Court of the State of Connecticut cannot enforce its judgment in the ordinary way, by execution; and it is therefore argued that its entire jurisdiction is lost. The Courts of Connecticut do not claim the right through the medium of an execution, to interfere with

the assets of the Bethel Bank, in the hands of the Receiver; no such power is needed. We take it for granted that the Receiver and Comptroller will faithfully discharge their duties, and will apply the assets of the bank according to the Currency Act. All we seek, through the medium of this suit, is the ascertainment, adjustment, and adjudication of our demands against the Bethel Bank. It is no uncommon thing for courts to have such power of ascertainment, while other departments of the Government see to the proper enforcement of the claim. Such examples are common in the Courts of Connecticut, and are, I doubt not, familiar to your Honors. A very familiar example is found in cases of a disputed claim against the estate of a deceased insolvent, wherein the appeal being taken to the Superior Court, an issue of fact is joined, and at request of either party, is tried by jury, and a judgment rendered according to the verdict, but no execution issues thereon; the judgment is conclusive, and being certified, must be allowed on the distribution of the estate. Another illustration is found under the laws of the United States, where suits are brought against a collector, to recover duties paid under protest, in which, judgment being recovered against the collector, it is the duty of the Secretary of the Treasury to provide therefor, and in which no execution issues against the collector or his estate.—Act of March 3d, 1839, § 2, vol v, p. 348, Statutes at Large. Geary *vs.* Curtis, 3 Howard, p. 236, and Act of 26th February, 1845, § 1, Vol V., p. 727, Statutes at Large.

So, where a suit is pending against a defendant who is declared a bankrupt, it may, by leave of the Court of Bankruptcy, proceed to judgment for the purpose of ascertaining the amount due, but execution shall be stayed. (Bankrupt Act of 1867, § 21.) So, too, on an appeal from the rejection of a claim presented by a creditor, the matter is brought to an issue by appropriate pleadings in the Circuit Court, tried as the case may be, by jury, and formal judgment is entered on the verdict, but no execution can be issued. (Bankrupt Act of 1857, § 24.)

So far as authorities have been referred to by the plaintiff in error, in supposed maintenance of the idea of *constructive dissolution*, it. is sufficient to say, First: *If in conflict* with the *express provisions* of the Currency Act they can have no force. Second: The anthorities from the New York reports were cases in Equity, where judicial procedings were instituted for the direct purpose of winding up the affairs of an insolvent corporation, and are not the recognition of *constructive dissolution* as a defence to an action at law. They proceed on the Statutes of New York, which permit receiverships of two kinds, one for temporary purposes, which may cease without terminating the corporate existence; the other a receivership in aid of a preceeding in equity which terminates in a decree of dissolution. In the other authorities referred to, *actual* dissolution is assumed; it is, therefore, submitted that those authorities have no application, whatever, to the case in hand, which is a proceeding in law, and controlled wholly by the Currency Act and its proper construction.

My continued ill health prevents me from enlarging upon and enforcing the foregoing arguments to the full extent I desired, and from presenting them in the precise order most desirable, but I cheerfully submit to the Court, that the Currency Act, upon its most direct and plain construction, admits of and requires the concurrent jurisdiction in the State Courts, for which we contend.

A single word as to the general merits of this case. The defendants were fully heard on all matters of fact and of law, which they thought fit to bring to the attention of the Superior Court of the State of Connecticut. That Court, after a full and patient hearing, has found that the Bethel Bank is indebted to Pahquioque Bank in a large sum. The defendant was fully heard in the Court below on all its charges of "fraud and corruption" against the Pahquioque Bank. These charges were found to be without foundation and we submit that there is and can be no ground for attempting to revive these charges in a writ of error, brought simply for the purpose of revising *errors in law.*

Person may file
a Bankrupt in State
Court -
but should be required
to discover, not
upon the Bench
by Stat - 515

Gelpcke

Log court -
2 Wall 502

IN THE

SUPREME COURT OF THE UNITED STATES.

LOUISA CHEW, PLAINTIFF IN ERROR,

vs.

RICHARD J. BRUMAGEN, DEFENDANT IN ERROR.

ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

This suit was brought in the Court of Chancery of the state of New Jersey, by Richard J. Brumagen as complainant against Louisa Chew to foreclose a mortgage charged upon certain lands situate in New Jersey.

The Court of Chancery made a decree in the usual form for the foreclosure and sale prayed for.

From that decree Mrs. Chew appealed to the Court of Errors and Appeals, where the decree was affirmed.

From that affirmance she has brought her writ of error removing the cause into this court.

The facts in the case are as follows:

On 13th March, 1851, Robert Chew, then the husband of Louisa Chew, bought from one Peter Walker, a farm situate in New Jersey.

The consideration money was $7,000, and $3,500 of it was secured by a bond and mortgage given by Chew to Walker simultaneously with the conveyance of the farm by Walker to Chew.

This is the bond and mortgage which is in question in this suit.

Vide mortgage, page 55.

Vide bond, page 59.

On Nov. 18, 1851, Peter Walker executed to Stephen G. Wood an assignment of that bond and mortgage.

This assignment was made as collateral security for $1,700 due by Walker to Wood, which was increased on the 16th Feb., 1852, to $1,900.

Vide assignment, page 60, exhibit D.

On April 15, 1853, the assignee Stephen G. Wood sued Robert Chew the obligor in the Supreme Court of New York in an action at law upon the bond to recover the interest which had accrued thereon.

Vide page 39 (part of plaintiff's in error exhibit A).

N. B. *This exhibit A* is the exemplified transcript of the judgment record in New York in the aforesaid suit of Stephen G. Wood against Robert Chew. This exhibit begins on page 38 and extends to page 55.

By this judgment record it will be seen the suit was brought in the first instance only to recover past due interest on the bond.

Vide original complaint, page 39.

Chew answered and pleaded fraud in the inception of the bond, viz., false representations in the sale of the farm, and claimed to recoup his damages.

Vide Chew's original answer, pages 40–44.

Wood then put in a supplemental complaint claiming the recovery of the entire principal and interest of the bond.

Vide supplemental complaint, page 49.

And Wood again pleaded fraud by reason of false representations, and claimed to recoup his damages, the amount of which as pleaded exceeded that of the bond.

Vide answer to supplemental, complaint page 50–53.

On 13th March, 1859, that suit was tried at a Circuit Court held in the city of New York upon the issues raised by the foregoing pleadings before Mr. Justice Davies and a jury, and instead of a verdict for the whole amount of principal and interest claimed by the plaintiff viz : $3,500 and interest for the date of the bond, a verdict was rendered for $2,071$\frac{35}{100}$.

Vide page 54.

And upon this verdict Wood was given judgment with costs, on the 6th April, 1859.

Vide page 54.

And on the 11th April, 1859, Robert Chew paid and satisfied the judgment.

Vide page 19.

Pending the suit of Wood vs. Chew in the Supreme Court of New York, Peter Walker died, and Catharine Walker became, under appointment of the proper court of New Jersey, the administratrix of his estate.

Vide page 13.

By an instrument purporting to be dated Dec. 10th, 1857, but not acknowledged until 23d August, 1866, Stephen G. Wood assigned the bond and accompanying mortgage to Martin Braisted.

Page 61, 62.

N. B. There are *two* certificates to the execution of this last instrument,—both bearing the same date— (23d August, 1866), one of which represents the assignment as *having been executed at that date*, viz : 23d Aug.

Page 62.

By an instrument purporting to be dated April 9th, 1859, Martin Braisted and Catherine Walker as administratrix, assigned the bond and mortgage in question to Richard J. Brumagen (defendant in error).

Vide page 62, 63.

In 1864, R. J. Brumagen (defendant in error here) claiming title to the bond and mortgage under such assignments, filed his bill in the Court of Chancery of New Jersey to foreclose the said mortgage, averring that the entire principal and interest thereon was due and unpaid.

Vide bill of complaint, pages 4–9.

Robert Chew the mortgagor died in the year 1863, leaving his last will and testiment, and his widow Louisa Chew (plaintiff in error), executrix thereof and possessed of the farm in question. Mrs. Chew put in her answer in the foreclosure suit, and in it pleaded in bar the judgment rendered in New York in 1859, in the suit of Stephen G. Wood against Robert Chew, claiming that the bond became merged in such judgment, and was extinguished by the payment thereof, and that such judgment was an effectual bar to the foreclosure suit.

The learned chancellor overruled the plea, and decreed a foreclosure for

the whole amount of the bond and mortgage less the amount of the judgment in Wood vs. Chew.

Mrs. Chew appealed from that decree to the New Jersey Court of Errors and Appeals, where the decree was affirmed, whereupon she brought this writ of error.

The opinion of the chancellor will be found on page 69, 70.

The opinion of the Court of Errors and Appeals is on page 64–69.

POINTS FOR PLAINTIFF IN ERROR.

FIRST. It appears to have been agreed in the courts of New Jersey that the whole case turns upon the effect to be given to the judgment rendered in the Supreme Court of the state of New York in the case of Wood against Chew, and if it has any force it is conclusive against the rights of Brumagen. the defendant in error.

(1). It also appears to have been assumed that the infirmity in the New York judgment arose from the fact, that Peter Walker, nor his legal representative, although named as a defendant in the case of Wood against Chew, was not in fact served with process, and did not appear in the action.

(2). Brumagen claims under Walker's title, and by way of presenting the case in its simplest form, it will now be convenient to restate a few leading facts:

(*a*). The bond and mortgage in question were given by Robert Chew, the then husband of the plaintiff in error, on the 13th of March, 1851, to secure the payment of $3,500 and interest.

(*b*). On the 18th of November, 1851, Walker assigned the bond and mortgage to Stephen G. Wood, as a collateral security for $1,700, which on the 16th of February, 1852, was increased to $1,900.

(*c*). On the 15th of April, 1853, Stephen G. Wood, assignee of the bond and mortgage, brought an action on the bond in question, against Robert Chew, Peter Walker being named in the summons and complaint as defendant in the Supreme Court of the state of New York, to recover the interest thereon, alleged to be in arrears and unpaid.

(*d*). Robert Chew answered the complaint of Wood, and set up that the bond and mortgage was procured by Walker, under false representations in respect to the land sold, and claimed to recoup his damages thereby sustained. At the time this action was commenced, the principal money mentioned in the bond was not due and did not become due until the 15th of March, 1856.

(*e*). Before the trial of the action of Wood against Chew, Peter Walker died, and Catharine Walker became his administratrix, on the 20th of March, 1856 (page 48). After the principal of the bond became due, the plaintiff, Wood, was allowed to file a supplemental complaint claiming both principal and interest on the bond, and Chew was allowed to defend and *rec up* damages on the same grounnd as before. The supplemental complaint claiming judgment for the full amount of the bond ($3,500 and interest), was served in May, 1866 (page 50), and the answer of Robert Chew was made in September, 1857 (fol. 134). Upon the issue between Wood and Chew, the cause was tried in the Supreme Court of New York, and Wood recovered of Chew a judgment of $2,071,25 and costs on April 6th, 1859,

which, as no appeal was taken, became final (fol. 135). And this judgment was paid by Robert Chew, on the 11th of April, 1859 (fol. 51).

(*f*). It now appears that pending the suit of Wood against Chew in New York, after the death of Peter Walker, Catharine Walker, who it is assumed became his legal representative by authority of the Probate Court in New Jersey by a paper purporting to be dated Dec. 10th, 1857, the execution of which was acknowledged on the 23d of August, 1866. Stephen G. Wood assigned the bond and mortgage in question, to one Martin Braisted.

(*g*). Braisted and Catharine Walker as administrators of, etc., of Peter Walker, by a paper dated April 9th, 1859, assigned the bond and mortgage in question to Richard J. Brumagem the defendant in error (pages 62, 63).

(*h*). In 1863, Robert Chew died, leaving Louisa Chew his widow and the farm in question, and in 1864, Brumagem filed his bill in the Court of Chancery of New Jersey, for the foreclosure of the mortgage, and obtained the decree in his favor now under review.

SECOND. It cannot be questioned but that Wood after the assignment of the bond and mortgage to him by Walker, had the legal title, and could in all forms and places enforce it against Chew, the obligor and mortgagor. The fact that Wood held it as a collateral security for $1,900 and interest does not change the legal result. (Allen v. Randolph, 4 John Ch. R., 693).

(1). It is not perceived that Robert Chew could have successfully defended any claim of Wood, after the assignment, for principal and interest on the bond and mortgage, save perhaps (as happened) upon the allegation of some infirmity in the transaction between the original parties. He most certainly might have paid to Wood the whole amount of the money due by the condition of the bond, and discharged the obligation. If this could be done, a suit in favor of Wood upon the bond for the recovery of the money, with a successful result followed by actual satisfaction, would of necessity accomplish the same end, and discharge the obligation as to all the world, and the bond being paid the mortgage of course ceases to be of force or effect.

(2). The fact that Wood held the assignment as between him and Walker as collateral security for $1,900 and interest did impair his legal title and right as against Chew to enforce and collect and discharge and extinguish the bond and mortgage on payment or satisfaction. Thereafter Wood would hold the balance of the fund after paying his own debt, for the use of Walker, and would be liable to account for it in the quasi character of trustee. (Moses vs. Murgattroyd, 1 John, Ch. R, 119).

(3). It therefore follows that if Chew has paid or satisfied to Wood the amount due on the bond and mortgage, it was extinguished.

Wood took the assignment subject to all equities in favor of Chew against Walker and when sued by Wood, Chew had a right to set up by way of partial defence as he did, that he was defrauded by Walker in respect to the consideration for which the bond and mortgage were given. Upon this issue the jury found the amount due on the bond, for which judgment was rendered, and which Chew paid and the judgment was satisfied. This put an end to any claim of Walker against Chew or against the land. (New York Code §§ 112, 113; Rev. Stat of New Jersey, p. 801; Nixon's Digest (N. J)., 330; Murray vs. Lylburn, 1 John Ch., N. Y., 433 Barrow vs.